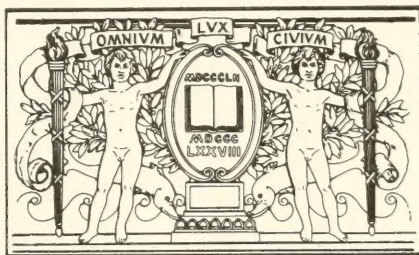


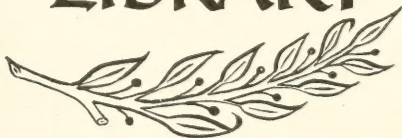


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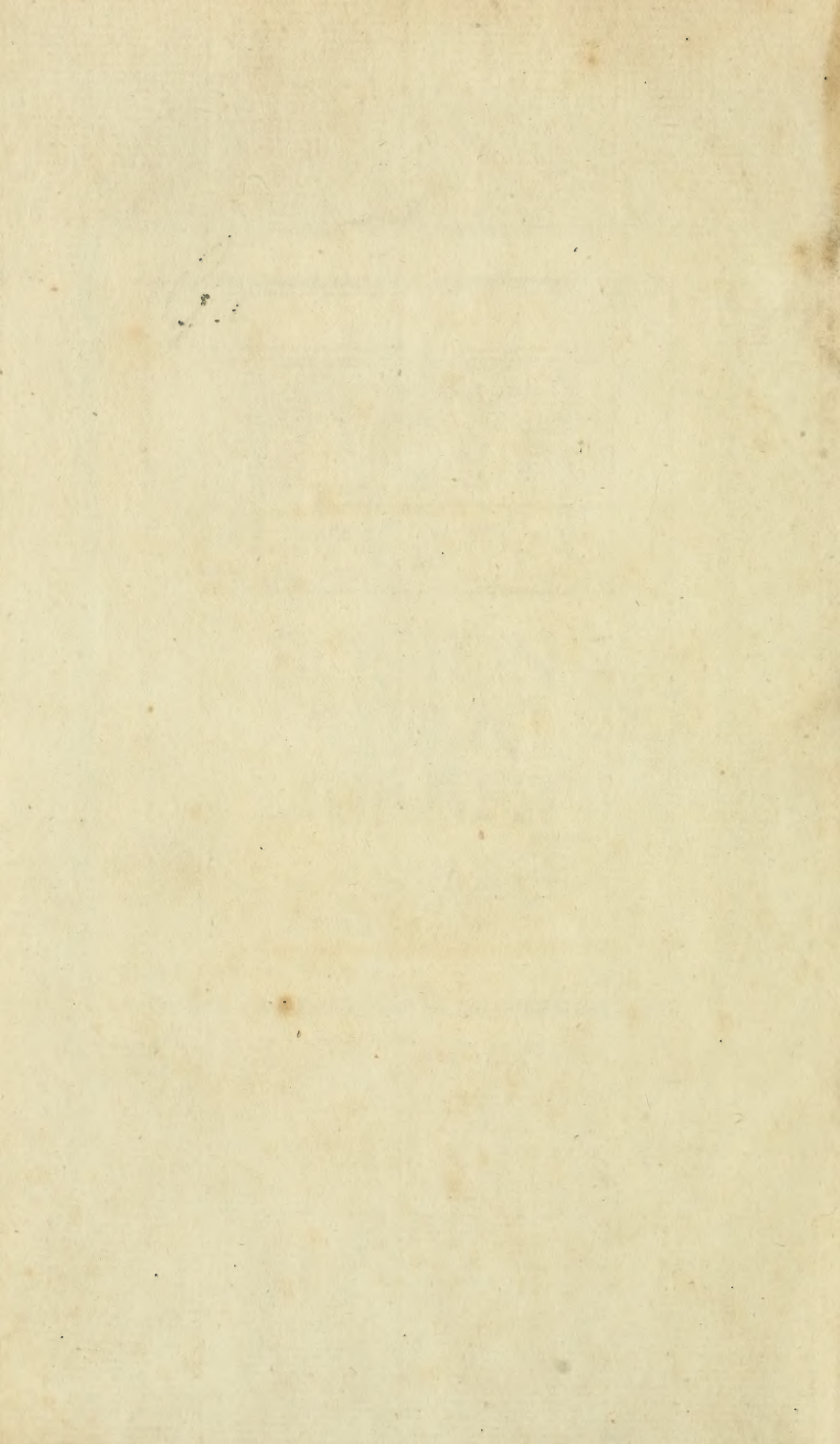


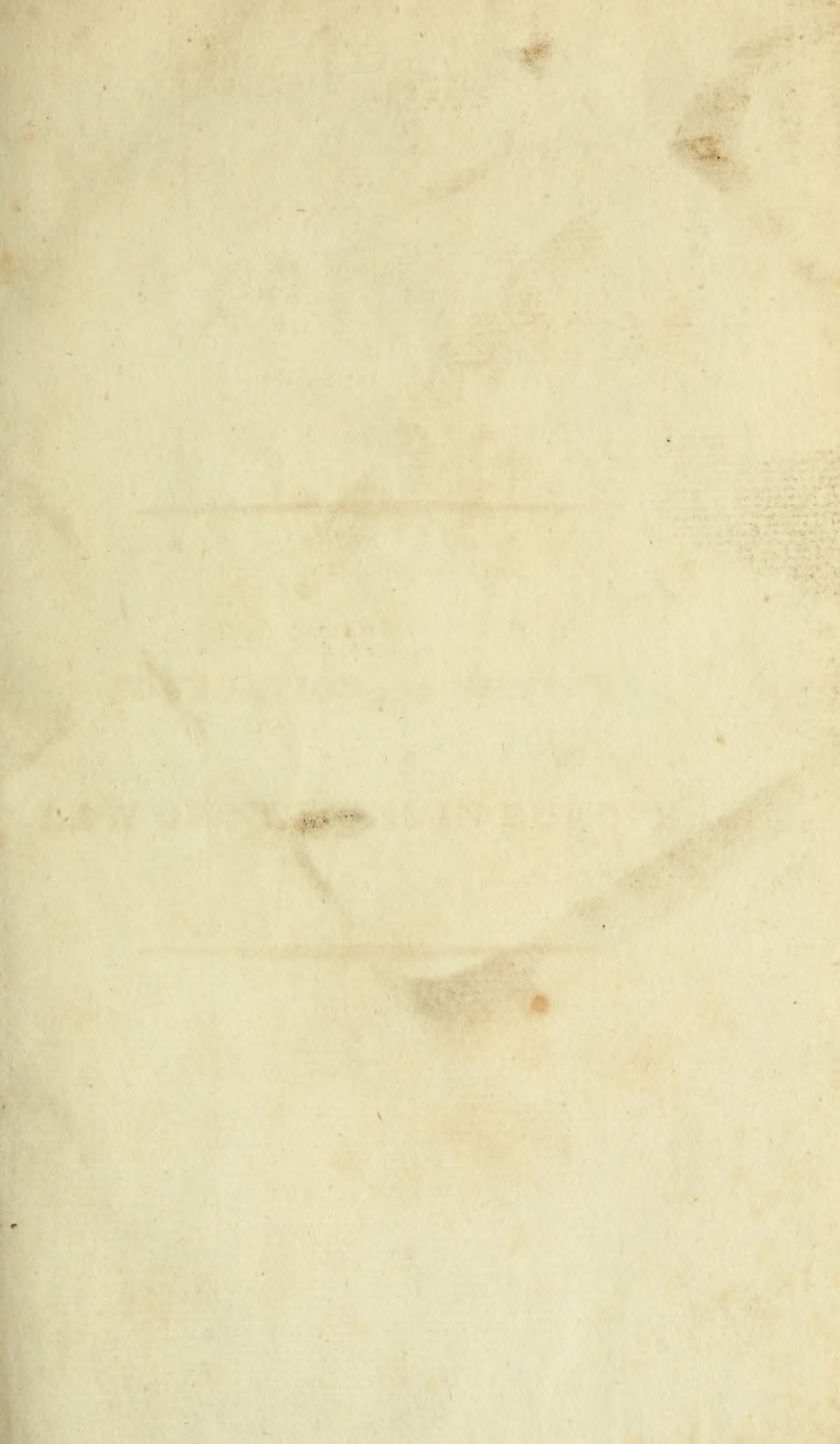
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THE  
FOUNDATION AND HISTORY  
OF THE  
LAW OF NATIONS IN EUROPE

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*Moriarty. Sen. Alun.*  
*In Collegio S. Patricii. Maynooth.*  
1838

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THE  
FOUNDATION AND HISTORY  
OF THE  
LAW OF NATIONS IN EUROPE.

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LAW OF NATIONS IN EUROPE  
OF THE  
FOUNDATION AND HISTORY  
OF THE



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AN  
ENQUIRY  
INTO THE  
FOUNDATION AND HISTORY  
OF THE  
LAW OF NATIONS IN EUROPE,  
FROM THE  
TIME OF THE GREEKS AND ROMANS,  
TO  
THE AGE OF GROTIUS.

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By ROBERT WARD,  
OF THE INNER TEMPLE, ESQ. BARRISTER AT LAW.

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Semina nobis Scientiæ dedit Natura, Scientiam non dedit. — SENECA.

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IN TWO VOLUMES.

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DUBLIN:

PRINTED BY P. WOGAN, P. BYRNE, W. JONES,  
AND J. RICE.

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1795.

TO THE HONORABLE MEMBERS OF THE HOUSE OF REPRESENTATIVES

IN SENATE

1875

REPORT OF THE

COMMISSIONER

OF THE LAND OFFICE  
IN RESPONSE TO A RESOLUTION PASSED BY THE HOUSE OF REPRESENTATIVES  
ON FEBRUARY 10, 1875

ALBANY: J. B. LEECH, 1875.

The report of the Commissioner of the Land Office, in response to a resolution passed by the House of Representatives on February 10, 1875, is herewith submitted. It contains a full and complete statement of the condition of the public lands, and of the progress of the various surveys and other operations connected with the management of the same. It also contains a statement of the various claims and demands upon the public lands, and of the progress of the various operations connected with the management of the same.

I had collected my materials, and was about to publish them, when I received from the House of Representatives a resolution, passed on February 10, 1875, directing the Commissioner of the Land Office to prepare a report on the condition of the public lands, and on the progress of the various surveys and other operations connected with the management of the same.

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## P R E F A C E.

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THE following work was originally intended to be nothing more than the preliminary discourse to one much less speculative, and of a more confined range.—I had, as well from taste, as from views of a private nature, which it is immaterial to mention, been led much to the study of the Law of Nations. I had thrown together a body of notes upon the particular parts of it, which were more immediately the object of my enquiries, and I conceived the design of collecting them into a work, which would have been called “A Treatise of Diplomatic Law.”

The nature of Sovereignty, and the rights of independent States: the manner in which they were created, and their mode of communication by Ambassadors; the different sorts of Embassies, and the consequent division of the Representative Character into Ministers of the first and second order; their rights and privileges, particularly their inviolability; the rank and pretensions of the nations of Europe; the nature and laws of Negotiation and Treaty; the legal sources of their authority, and the mode of their interpretation; all this I meant to consider.

I had collected my materials, and made my arrangements; the authorities, the facts, and the cases were ready, and I had nothing to do but to put them into language.—But, previous to this, a very important consideration engaged my attention, which, though it has moved the enquiry of every man that ever came to the study of laws, must for ever be interesting, and has not always been satisfactorily disposed of. I mean the account of that obligation in general, un-



der which we conceive ourselves bound to obey a law, *independent* of those resources which the law itself provides for its own enforcement. I was more particularly called to this consideration on the subject before me, because the law of which I was about to treat, having no common tribunal to execute its decrees, men were left merely to their consciences to determine whether they would obey it or not. Upon turning to the fundamental parts of all the treatises I had perused, I found myself referred to the Law of Nature for the real and original source of all the obligation in men to obey the Law of Nations; and this Law of Nature again, I was told to look for in my own heart and natural conscience, which were to decide for me *and all the world* in the same manner, in almost all cases. At the same time, the system of the Law of Nations was neither more nor less than a particular, detailed, and ramified system of morals, in which departure was made from that great outline, and those general perceptions, constituting the Law of Nature, and we were brought to the minute application of them to cases and doctrines to particular sets of people. All this, notwithstanding, was supposed to be really binding upon *all the world*, though it was confessed that all the world did not, and would not obey it. Cases of nicety even were brought forward and canvassed upon general principles, which *all*, it was held, were bound to observe, and they were therefore called upon to think alike of these *particular* cases, although they were a mere *application* of the general principles, and about that application, different writers were far from being agreed.

I own this never satisfied me; and when I considered how difficult it was *for the whole of mankind* to arrive at the *same* ideas of moral good, from the prejudices of education and habit, in the different stages of society in which they might be; more particularly when I recollected the great difference of opinion that was among very learned men, of the same nations and ages, and who had had the same sort of education concerning the Law of Nature itself; I was still more staggered in my belief that *all* the world were bound to obey the ramified and definite scheme of duties called the Law of Nations.

When I examined into my own belief concerning my obligation to obey this Law, I found it well fortified, and sufficiently firm. But it was so, from a particular set of opinions which I had imbibed from education and the force  
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of example, confirmed and directed by the authority and precepts of a religion in which I believed. Something certainly might be derived from my own natural propensities and feelings; but these last were far less distinguishable than the first; and had they been wholly independent of them, I found that they *perhaps* might not carry me so far as I certainly was willing to go, under the influence of those other weightier considerations. Still less, therefore, did I consider, that other persons, who had perhaps been taught by education, example and religion, to think of their duty towards their neighbour in a manner totally different from what was laid down in *our* Codes of the Law of Nations, could be bound to act exactly in the way prescribed by those codes. Neither could I imagine that I had any right to act towards all other people as if they had *broken a law*, to which they had never submitted, which they had never understood, or of which they had probably never heard. Where we were under the express commands of the Deity concerning them; or where they professed to observe a Code, so directly the opposite of ours, as to interfere with our happiness and just rights; then, indeed, I could conceive we might act towards them as towards *enemies*, whose disposition it was, like beasts, to prey upon us; but even then I did not perceive the fairness of considering them as amenable to the laws we chose to pursue, or as punishable for *breaches* of those laws.

It followed, therefore, that, although I myself could make out the obligation of the Law of Nations as laid down in the *European* Codes, and that others of the same class of nations, and the same religion with myself, could, and were bound to do so too; yet that the law was not obligatory upon persons who had never been called upon to decide upon its ramifications; who might widely differ as to its application, and even as to its general and fundamental principles. The history of mankind confirmed to me that there was such a difference in almost all its extent; that men had the most opposite opinions of their duties towards one another, if not in the great outline and first principles of those duties, yet most certainly in the application of them; and that this was occasioned by the varieties of religion and the moral systems which governed them, operated upon also by important local circumstances which are often of such consequence in their direction.

Under all these points, it appeared to me, that we expected too much when we contended for the *universality* of the duties laid down by the Codes of Law of Nations; that, however desirable such an universality might be, the whole world were not susceptible of that intimacy and closeness of union, which many philosophers of high name are willing to suppose; that it falls into different divisions or *sets* of nations, connected together under particular religions, moral systems, and local institutions, to the exclusion of other divisions or sets of nations; that these various divisions may indeed preserve an intimacy among one another, and obey the same law; but that they may be contradistinguished from others who may have different religions, and moral systems, operated upon by very different local circumstances: in fine, that what is commonly called the Law of Nations, falls very far short of *universality*; and that, therefore, the Law is not the Law of *all* nations, but only of particular classes of them; and thus there may be a *different* Law of Nations for *different* parts of the globe. Not only this, but even, in the same part of the globe, there may have been very different sorts of Law of Nations, according as revolutions have taken place in the religion, system of morality, and local institutions of the nations which compose it.

All this was to be proved from history, if proved at all. And, if the Theory was a just one, as any class of Nations would afford a proof of it, I set myself to a very serious examination of the history of the people of Europe, (as that in which we are most interested,) not with the old view of enquiring into their *general* manners and customs, their politics, their feats of arms, or their arts; but with the design to get at the maxims which governed their intercourse together, at various times, and under various revolutions in their manners; and these I resolved to set forth in detail, as a supplement and proof of the theoretical reasoning which I have mentioned.

This arrangement, however, as must be evident, took in a subject so vast, that to treat of it properly would far surpass the bounds of a mere preliminary discourse. At the same time it appeared to me to be fully of as much, or perhaps of more consequence than the work which had originally given rise to it; and as professional occupations prevented me from finishing the whole, I resolved to abandon



don my first plan altogether, and to confine my attention to this other subject which had thus grown out of it. And well have I been repaid for the labour it has cost me ; since my mind has been minutely occupied by a series of the most important and interesting subjects, of which, before, it had but a general idea. For although very great masters have gone over all, or most of the ground I have taken, before me ; yet they have done so in a very different manner, and with far different objects. Thus, although the facts I have brought together in the historical part of the following pages, have most of them long been known, and many of them form the materials of very popular histories ; yet the view with which I came again to their contemplation, made them appear to me in a new light ; and although I had attended to most of them before, yet I acquired from them fresh entertainment, because they afforded me fresh instruction.

The facts of history indeed lie open to every man's observation ; and every man draws conclusions from them, according as the bent of his mind, his professional pursuits, or any particular purpose inclines him. In this respect, history would be valuable, were it no more than a dry series of events, brought together with accuracy and clearness for philosophy to work upon. This, in some measure, has been the case. The first histories are short and rude, and apparently uninformative, from the want of proper comments. In process of time, men have distinguished themselves, and done good to the world, by the use which their observation and judgment have made of them, and they then assume a variety of different and novel forms. Thus, from the same collection of facts, one has drawn a history of man ; another, of the progress of society ; a third, of the effects of climate ; a fourth, of military achievements ; a fifth, of laws in general ; a sixth, of the laws of a particular state. But it has never yet been the fortune of the annals of the world (at least not within my knowledge) to produce, from any commentator, *A HISTORY OF THE LAW OF NATIONS.*

In this point of view, history may be compared to a vast and diversified country, which gives very different sorts of pleasure to different travellers, or to the same traveller if he visits it at different times. One travels to acquire a knowledge of man ; another to survey the political resources of the

the state; another with a view to its commerce; another for mere pleasure: and the same people, the same cities, and the same institutions, will afford high and varied satisfaction according to the spirit of mind in which they are viewed. If the comparison hold good, I should hope that little apology is necessary for bringing before the world, many facts and cases already well known to it, but all the consequences of which are, perhaps, not so well known. Thus for example, every one knows that *Charlemagne* renewed the Western Empire; that the *Hanseatic League* was a powerful commercial association; that the *Queen of Scots* was put to death by *Elizabeth*, contrary to justice; and that prisoners of war used to pay large sums for their liberty to those who took them. Yet those who have related all these things, were not perhaps led to consider what relation they bore to the LAW of NATIONS at the time when they happened; the real nature of the Imperial title thus acquired by *Charlemagne*; the question of the *sovereignty* of the Hanseatic alliance; the effects, as a precedent, *in point of law*, of the case of *Queen MARY*; nor the rules, public and private, by which the custom of *RANSOM* was governed.

In the relation of any transaction, however, I have studiously avoided all those parts of it which did not appear to be directly relevant to the point immediately before me: and I have gone from one history and one age to another, and from one part of the same transaction to a different part of it, as it suited the enquiry I was upon, without staying to complete any account which I had begun, when such completion was not necessary for the purpose with which I wrote.

In considering the effects of certain great local institutions upon the Law, such as the FEUDAL SYSTEM, the ECCLESIASTICAL ESTABLISHMENTS, the CRUSADES, or CHIVALRY; I have not even attempted to give any account of the Institutions themselves; but supposing them perfectly well known to the reader, or referring him to such authors whose professed object was to treat of them; I have barely selected such parts of them as are connected with my own subject: thus, the history of Fiefs; the particular duties of vassal and Lord; the account of the papal usurpations over the *Clergy* of particular kingdoms; the causes or history of the Crusades; the minutiae of the military duties

duties of Knights ; the law and custom of Tournaments, or the rise and fall of Chivalry in general ; all these I have purposely avoided, and have busied myself alone about those parts of them which bore upon the maxims concerning the public intercourse of nations.

It follows, therefore, that those who come to the perusal of this work ought, in common justice to the subject, to be in possession of much previous knowledge. It follows also, I hope, that however obliged I may be to the learning and patience of those who have gone before me, upon the progress of mankind ; yet the manner in which that subject is now treated, is not destitute of novelty. Upon many of the above-mentioned points, men of high characters for learning and sagacity, have dived into antiquities, and have erected systems. It has been my part to consider how those systems operated upon the Law of Nations ; a question which they thought too remote from their subject, or which they never thought at all of considering. Thus Pffefel, Montesquieu, St. Palaye, Selden, and Robertson, have with great diligence and learning surveyed particular parts of the history of Europe, with a view to their own particular purpose. I have largely profited by their labours, and have followed them with great respect through those erudite and critical disquisitions which led to the settlement of doubtful points, the elucidation of which was necessary before my own enquiries could even begin. At the same time I have by no means always contented myself with the mere authority of their names ; but have gone over, wherever I had opportunities of so doing, the original documents on which they have founded their reasoning. Much indeed have I to wish that these opportunities had been greater ; but such is the immense mass of their knowledge, and the extensive range of their subjects, that I had neither time, nor materials, nor abilities, to pursue them minutely through all the intricacies which they have unravelled. From the little, however, which I was enabled to do myself, I gained much. It imprinted the important matters contained, more strongly on my mind ; it added greatly to my own stores ; it taught me where to look for much necessary learning, and enabled me, if such presumption may be allowed, to gather up some few things which had escaped their attention. Some of the niceties of the Feudal System, which might have been gained



gained from *Beaumanoir* and *Du Cange*, and the entire discussion concerning the rank and claims of the Emperor, which Robertson has wholly passed by, may probably prove this.

These observations, however, relative to those who have preceded me, are not to be extended beyond a small part of my subject. In the discussion of many points I had not the benefit of their assistance, and was left entirely to my own resources, such as they were. Almost the whole, for example, of the *History of the Law of Nations*, of the critical chapters upon the effects of Treaty and Convention, and the Rank and Claims of the Nations of Europe, were to be collected alone from a careful attention to a dry series of early Treaties, or the comparison of a number of insulated facts. I have endeavoured also, all the way through to engraft as much new matter as my own studies could acquire, upon the mass which had been gathered together by the critics and historians I have mentioned; and for this I was driven to the inspection of many of the monks, and of those vast collections of laws which do so much honour to the patient labour of the antiquaries.

Such then is the view which I have attempted to take, and such the authorities I have sought in the *historical* part of the following Treatise. I will not flatter myself by supposing that its scope is *entirely new*; but I am not unwilling to hope, that opinions which have hitherto rather been hinted than detailed at large, have here been brought forward under an ample and accurate form. For it has been my best endeavour to fix in their proper place, and to set in a broad and clear point of light, opinions upon the facts of history which are only to be collected by dint of much reflection, and the frequent comparison of things which pass off in the general detail, as matters of little consequence.

Upon the whole, then, the work which is now presented to the world, may be said to consist of two parts. The first is occupied with endeavouring to settle the construction of the Law of Nations: and above all, as most necessary to the fabric, what is its real foundation. In this our attention is most claimed by an enquiry into the obligation of Natural Law, and the endeavour to discover whether that Law can conduct us, and *the whole world*, to think exactly in the same way concerning those definite and particular

ticular schemes of duty which compose the province of moral philosophy. And in this very important enquiry, that I may not be mistaken, I beg leave here to observe, that I intend not by any means to *reject* the Law of Nature as forming a *part* of the foundation of the Law of Nations ! but simply to point out, that while men have been known to entertain such discordant opinions concerning the *ramifications* of that Law, it cannot lead us to that certainty concerning virtue, which would oblige *all mankind* to think of it exactly in the same manner : If this is so, therefore, that we must look to something else as the *binding principle* of DUTY, and that those only we can expect to think alike, concerning it, who are known to have the same opinions concerning the *binding principle*. I by no means intend to say, that into the composition of this *binding principle*, the Law of Nature, *according to our ideas of it*, does not enter. But I hold that there may be others who have also *their* Binding Principle, for the moral system which *they* chuse to follow, into which the Law of Nature, according to *their* ideas of it, may *also* enter : and if these two systems should recommend very opposite things as *duty*, the Law of Nature being thus (*under different interpretations*) common to both, we cannot expect an *uniformity* of opinions, merely because we chuse to say that they rest upon that Law.

If this therefore be just, I hold that there may be systems of morality called the Law of Nations, of very different characters, and that if we trust to the Law of Nature alone for a guide, we may be disappointed in expecting to find an uniformity of sentiment in the nations to whom we may address ourselves. And hence it is necessary not only that we should have something more fixed and definite as the foundation of the Law of Nations, but that we should content ourselves with composing a code for those nations alone, who think as we do concerning that foundation.

This something more fixed and definite, I conceive to be RELIGION: not *natural*, (for that is nearly as vague as the *Applications* of Natural Law itself) but *revealed*. For however floating the ideas of mankind may be concerning natural duty, the precepts of such a religion must at least superinduce CERTAINTY among those who believe in it.

Hence therefore it is, *in addition* to the Law of Nature, not with a view to reject it, that I hold religion, and the  
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moral system engrafted upon it, to be the truest foundation for that code of morality which we call the Law of Nations.

I am the more anxious that I should be so understood, because I have unfortunately been thought to mean things very different, by some professional friends, in whose judgment and acquirements I have no inconsiderable confidence. Upon viewing (before the work was completed,) the discussion contained in the second chapter, they contended, that although I had stated the argument in favour of the *uniformity* of the Law of Nature, with fairness against myself, and although I professed to confine my objections solely to the uniformity of *the application* of that Law; yet that my own argument went to its utter annihilation; and that whatever I might think, I had yet made out Man, *independant of Christianity*, to be a creature about whose nature we had no lights at all, and who had a *right* to consider his own will and appetite as his law.

Whether I have done so or not; whether I have not endeavoured cautiously to extend my meaning solely to *the application* of Natural Law to certain *definite* and *positive* duties, the reader is now to judge; but at any rate, should my mode of treating the subject be thought to go to so great a length, I am not sorry here to have an opportunity of giving a key to the argument, as far as my own intention respecting it, is concerned. In the discussion to which I allude, there were not wanting many persons in whose knowledge I also confide, who differed in toto from those above-mentioned; and on a subject which is of confessed hardness, and has divided the opinions of men far above me in every sort of attainment, I cannot but expect much difference of sentiment upon almost every thing that can be said of it. But the demonstration of the possibility to mistake my own meaning upon the matter, makes it desirable for me to have thus an opportunity of doing justice to myself. At the same time it is right to mention, that the objections that were actually made, though opposed, as I observed, by others, induced me to make a little, and but a little alteration in the chapter, after it was printed. It is confined solely to the endeavour to tie down the meaning of the argument, so as that it cannot now, I believe, be misunderstood.

With respect to the positions themselves, I can have nothing here to add. They have for ever divided the opinions of mankind; and I pretend not therefore to the  
power



## P R E F A C E.

power of shaking the sentiments of men who may have considered, and made up their minds upon the subject. All I hope from these, is the acknowledgement that I have stated the argument in favour of uniformity with perspicuity and fairness. Of the answers to that argument, those to whom the subject may be new, will now judge for themselves.

The second chapter having endeavoured to destroy the idea of uniformity and certainty in the opinions concerning *the application* of Natural Law to the duties of human life; I proceed in the third to enquire what it is that will produce greater certainty, at least among particular classes of nations; and having shewn it to be the religious and moral systems of those nations, I rest the foundation of their Law upon those religious and moral systems. I afterwards endeavour to prove, that CHRISTIANITY is the only *certain* foundation for that code which is observed by Christian, in other words, by European nations.

These three chapters are therefore to be taken together, before we can complete the account of the foundation and construction of the Law of Nations in Europe. The fourth chapter is a mere ramification of the argument in the other three, which goes to prove that the Law of Nations is not to be considered as the Law of the World, but only of particular classes of Nations, united together by similar religious and moral systems, and influenced by particular local institutions. The fifth is an attempt to point out how different *classes* of nations may be distinguished: and with this finishes what may be considered as the first part of the enquiry.

Of the second we have already said much. It is needless to add that it comprises the historical part of the work, and is to be considered as the necessary consequence and proof of the first. In this I have begun as early as any certain documents would permit me, nor will any reader perhaps be wishful to go deeper into the antiquities of Europe than the commencement of the Empire of the Greeks and Romans. Dr. *Falconer* will excuse me for having presumed to differ from him in the endeavour to account for the opposition of the maxims concerning their treatment of prisoners, which were observed by those nations. The subject was not before him except collaterally; but I neither wish, nor mean to challenge his attention to a part of my enquiries,

ries, on which I have to confess that I have not used much labour.

The account of the *Scandinavian* Law of Nations, is one of the strongest proofs of our theory. The effect of their military religion, if I may so call it, upon their duties towards their neighbours, was palpable and violent : the regularity and order of the world were by them annihilated : and from the time of their establishment upon the ruins of the Roman Empire, the history of the Law may be almost said to re-commence. It will be needless to point out to the reader the great use which in this part of my work I have made of the Northern Antiquities compiled by Mr. Mallet; whose selections are not more instructive as a picture of the mind of man, than they are pregnant with genius as beautiful poems.

In the course of this *Historical* part of the enquiry, I have, I fear, pursued but little method. Wherever I have found events of the same kind crowding after one another in a perpetual stream. I have followed them in a mere plain relation; nor have I aimed at farther order in the recital, than to endeavour to class facts of the same character together. Where, however, I have found a period in which new and striking changes in the law present themselves to notice, and the conduct of nations proceeds upon principles unknown before; I have then stopped the current of the history, and digressed into a critical enquiry concerning them. Thus the eighth, ninth, and tenth chapters, are a mere series of events; the twelfth, thirteenth, fourteenth, fifteenth, and sixteenth, form so many critical disquisitions concerning the influence of certain particular points, which gave a new character to the maxims of Europe. The seventeenth Chapter resumes the thread of the history chronologically, with this new character accounted for, (as far as it lay within my ability to account for it,) and continues it to the seventeenth century, beyond which I meant not to extend it.

Why I have fixed upon this period as the close of the Treatise, is to be explained, partly by the consideration that the law has from that time been nearly stationary; but chiefly because it was the age of GROTIUS, to whose Treatise little can be added, and from whom on any point it would be almost in vain to differ. Before his time the true principles of the Law of Nations were scarcely known. He broke ground, as it were, for a new cultivation; but  
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he did it with such ability, that the plans which he traced, and the method which he introduced have scarcely been altered, and remain to this day the proofs of a skill which was consummate.

By his exertions the law was new modelled, and the reasons for our duty as practised at this day, were either absolutely started for the first time, or marshalled in better order than they had ever yet been before. Beyond the Treatise therefore *DE JURE BELLI ET PACIS*, it was scarcely necessary to go, except to mention the few others that have attained to the honour of constituting, in conjunction with it, the codes of the duties of nations as observed at present. The state of the law as a science, immediately previous to the publication of this incomparable work; a very slight account of its author, and its progress, together with the reasons which gave birth to the works of *PUFFENDORF* and *VATTEL*, finally close the present Enquiry.

From this account therefore of the following Treatise, it will be seen that it pretends not to lay down what the law now is, but merely endeavours to point out what it *has been*. It may be said to be the history of former opinions, and does not therefore assume any thing like a legislative tone. I shall be too happy if, humble as the design confessedly is, it may be deemed to have derived the smallest merit from the manner of its execution; and I shall be more than paid, if it ever arrives at the rank of being considered as an elementary book, for those who come new to the study of the subject.

I have a little, and a very little to add concerning the execution of the work. The reader will no doubt observe that I have not been sparing in quotations, both in the body of the Treatise, and in the Notes. I am aware myself, how this interrupts the attention, and particularly how it interferes with uniformity by the necessary change of style! But in an enquiry of this kind it was perhaps unavoidable. Many parts of it are purely critical, and therefore argumentative; and in these cases we know how little an author's word can, or ought to be taken. I mean not to say that he would wilfully declare what he does not believe, or any thing of which he does not *think* himself certain; but such is the constitution of our natures, that we are liable to be led away by a favourite system, and often to be de-  
ceived



ceived by a particular bent of mind. Where this therefore is possible, it becomes the absolute, the bounden duty of the author, to set before his reader the sources of his information: and, if he argues from cases of authorities, to state them in the very same simplicity and amplitude, under which they appeared to *him*. This has often seemed so necessary to various writers, that they have generally subjoined at the end of their works, *Appendixes*, or *Collections* of what they call *proofs* and *illustrations*, which those who read for mere amusement, have as generally neglected. But as I profess not to write for those who read for mere amusement, I have had no scruple in interweaving these proofs and illustrations so closely with the body of the work, that the one is made to depend upon the other for its very connection and uniformity. And I have chosen this mode the rather, because, as I pretend to no attractions of arrangement or style, I am sensible that the merit (if any) of the following pages, must depend simply upon the faithfulness and accuracy with which authorities are quoted. I am therefore not deterred by the fear, (so common I have observed, with many writers) of interrupting the course of the narrative, or of diverting the reader's attention. I know not indeed if I am right, but I have long thought that the art of bringing plain and authentic documents into a clear point of view, so as to affirm or deny a thing, or to prove that it cannot be either affirmed or denied, is the great merit of historical or of argumentative writing. Too great an attention to the decorations of language, may often lead us far away from this true point. It may please, but without the other it cannot fill the mind; it often leads to error, and is at best but meretricious.

This therefore is another object to which I have shaped my exertions; and whatever may be my opinion concerning a point of doctrine, or a particular transaction, if I may be thought to have stated them with clearness, and supported them with sufficient authorities, it is all the praise I can expect, since it is all to which I have aspired.

In the investigation of certain matters, I have ventured to quit the beaten path, and to differ from authorities whose deserved reputation would overwhelm me, did I not feel well supported by illustrious auxiliaries. Had I therefore nothing but myself to oppose to them, I should not have dared to have sallied forth from obscurity. But being thus supported,

supported, I have without the wish, and at the same time without the dread of provoking controversy, attempted to set forth the grounds for my opinions. What I allude to, are, amongst others, the questions concerning the difference of treatment experienced by Greek and Roman prisoners; the privilege of private war in the antient Barons; the *Sovereignty* of the Hanseatic League; the nature of the Imperial Dignity; the exemption of Ambassadors from the jurisdiction of the criminal Courts of Law in England; and the case of Queen Mary of Scotland! It is with very great diffidence that a young professor of the science of law, can pretend to withhold his assent on these points from whatever his superiors have asserted before him. Why he has done so, he has endeavoured with all his ability to explain, and the public will judge, I hope, with their usual candour.

Throughout the whole I have to lament the total want of assistance from men of experience and authority. The work which is now presented to the world, is in fact the mere lucubration of a private person, left entirely to himself to collect his materials, to speculate, and to decide. At the same time, the sole reason for this perhaps, was his fear of trespassing upon the time of such men, when it might be more profitably employed for themselves and for their country: Since however irksome it must always be to intrude our works upon others for correction, the well-known liberality of the learned professions deprives the intrusion of the greater part of its terrors.

One thing more before I have done. In the course of the following pages, there will be found some few allusions to the late transactions of the French nation. In all that I have said concerning them, I claim to be considered as a man arguing without prejudice, partiality, or resentment. I have not gone out of my way either to meet, or to avoid the subject; and on all occasions wherein I mention them, I profess to have taken them up simply as the best illustrations I could find for the argument I might have in hand. And, as in one place I particularly observe, all that I have said of them, may be so said, when we are in profound peace with them, or at some future time, when the names of France and England, their mutual rivalry, their hatred, or their contempt, will be only known in the relations of History. At the same time it is in fairness to be remarked, that the conduct of this nation is now *somewhat* mended,  
and

and that the points most complained of were the effects of the influence of a merciless tyrant, or of dark minded ruffians who have already, most of them, met their reward.

And now I will release both the reader and myself, from a discussion which I feel to be growing but too long. The hopes and anxieties of a young author committing himself for the first time to the public, whose praise or whose censure, he has not hitherto been even in the way to court or to fear; will be my excuse if I have trespassed too much in this prefatory discourse. I cannot conclude without observing, that whatever may be the fate of the main design; whether it be received with favour, or rejected with contempt, I have this sound consolation: that my intention has been to do good to my fellows in that province for which by inclination or study I am best fitted. To endeavour after this is the duty of all mankind, and if the work fails, the glory of the attempt may perhaps alleviate the disgrace of the fall.

*Inner Temple,  
March 20th, 1795.*



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THE  
FOUNDATION AND HISTORY  
OF THE  
LAW OF NATIONS  
IN  
EUROPE.

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CHAP. I.

WHAT THE LAW OF NATIONS IS.

IF we look through the history of Man, we shall scarcely be able to find an instance of two or three of the species being gathered together into society, without the observance of some Law.

The necessity for Law in general, drawn from the nature of mankind, and their analogy with other parts of the Creation; if not a self-evident truth, has been so well demonstrated by a number of respectable writers, that it would be unnecessary to give the discussion a place in this work. But the *foundation and structure* of Law; particularly of that part of it which we propose to ourselves as a subject of enquiry; are questions about which there has been so much difference of opinion, but which it is yet so

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essential to understand with precision, that it will be right to examine them with care and attention.

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The Sum of Mankind may be said to be composed of independent Nations, Families, or Individuals; and the laws which govern them may be viewed under two relations; either as they concern the *interior* of those nations or families, to be observed by their different component members; or as they concern them in their *exterior*; that is, in their conduct towards one another in their collective capacity; not as *individuals*, but as *Nations*.

The first of these we call the CIVIL or MUNICIPAL LAW; as prevailing in a particular state, city, or body corporate; the last we call the Law of Nations; as prevailing among the different nations which, together, make up the whole of the world.

The difference between these two laws is remarkable.

The one, whether it takes its rise from the will of each individual, signified in formal convention to each other; or whether it proceeds from mere custom, the date and origin of which no man can tell; has always some common *Sovereign Tribunal* to expound its meaning and enforce its decrees. The other has no tribunal whatever; no judge to appeal to but the rest of mankind.

The consequence is such as might naturally be expected; the one is for the most part, well understood, and uniform in its operations; the other is often unsettled in its principles, and as to its operations, generally uncertain.

To settle therefore, as far as a thing so fluctuating will permit, the true *foundation* of this remarkable law; what it is that renders it binding upon mankind; the changes to which it is liable; and the causes of those

those changes; is the ultimate object of the work before us. To enquire into its form and appearance, is the immediate scope of the present chapter. The subject is by no means without difficulty, notwithstanding the volumes that have been written upon it; and the question, What constitutes the Law of Nations, or how it is that it obtains? has been as differently answered, as it has been frequently put. Upon the whole however, the great points of difference concerning the mode of its structure, seem to turn upon this; whether the Law of Nations is merely the law of *nature* as it concerns man, *and nothing more*; or whether it is not composed of certain *positive institutions* founded upon consent.

The lawyers and philosophers of antiquity; the oracles of the Digest; and in modern times, *Hobbs*, *Puffendorf*, *Burlemaqui* and others, (a) support the first opinion. *Suarez*, *Grotius*, *Huber*, *Bynkershoek* and in general the more recent authors, declare for the last.

The manner in which the first set of writers account for their sentiments, is by erecting that famous theory, by which man in his origin is considered in a state of the most savage independence; an inhabitant of woods like the beasts of the earth; like them the possessors of a solitary den, and like them, attending to no calls but those of appetite.

This uncouth, but interesting picture arose first perhaps in the imaginations of the poets, (not improbably of those who united legislation with poetry,) and from them was eagerly adopted into more regular systems of jurisprudence. Accordingly, no mode of expounding the spirit of laws and government, has been more common than that which traces every thing up to the creation of man; or, in other words,

(a) See much learning upon this in Taylor's Civil Law, from p. 99 to 132. quarto edition.



to Man, as it is called in a *State of Nature*. This Theory, though often started, and beautifully amplified by the antient Poets, (b) seems first to have been thought of as the foundation of a *System of Law*, by *Hobbs*, in his famous book called the *Leviathan*, in which there is so much to admire, and so much to condemn.—It was adopted, and considerably enlarged by *Puffendorf*, and instantly approved of by writers without number. The result of their speculations is, that man in such a state, owing obedience to none, and having no positive law to controul him, trusts for the direction of his conduct to nature alone: The influence which she has over him, and the motives which, distinct from divine or human institutions, impel him to forbear from, or to perform any particular action, are called the *Laws of Nature*; (c) and what ever number of men there may be within the sphere of one another's intercourse, their conduct towards each other, (while thus independent of civil bonds,) proceeds solely under the government of these laws.

When, however, civil society came at last to be instituted, men divided themselves into separate communities, and agreed to be governed by particular positive institutions, in which many of the rights conferred by mere nature were given up, for the better preservation of the rest: but the Communities in their relations with one another, having given up none of these rights, they still continue to be governed in all their public transactions, as the individuals that composed them originally were; and thus the *communities* of the world remain in a state of nature with

(b) Particularly *Lucretius*. Lib. 5.

(c) Enimvero utrobique intellegimus propositiones quasdam immutabilis veritatis quæ actiones voluntarias circa bonorum electionem, malorumque fugam dirigunt, ac obligationem ad actus externos inducunt; etiam citra leges civiles, et seposita consideratione patrum regimen constituendum.

Cumberland De leg. Nat. 6. 1.

respect to one another, and of course can follow no other law but the law of nature. Hence, says Hobbs, the law of nature admits of two divisions: First, as it is applicable to men as *individuals*; secondly, as it regards them as collected into Nations. The last is what is called the Law of Nations, which is thus nothing more than the Law of Nature. (*d*)

Such is the train of reasoning adopted by those who contend that these two laws are exactly the same with one another; and the favourers of this system are so numerous, and have existed in times so ancient, that it would seem almost presumptuous to have any doubt of its soundness. The opinions of the authors of the *Digest* and the *Institutes*, are all founded upon it; and nothing is more common than to use the two laws in senses nearly synonymous. (*e*)

“Law,” says Dr. Taylor, “must be either *natural* or *instituted*, viz. such as God prescribes in the voice of reason, or such as man appoints by his civil sanction: to which must we refer the Law of Nations? To the law of nature doubtless, of which it is a part: for if we consider its origin, it is the law of nature; if the object or application of it, it is the

(*d*) De Cive, Cap. 14. Sec. 4. “Rursus Lex naturalis dividi potest in naturalem *hominum*, quæ sola obtinuit dici Lex naturæ; et naturalem *Civitatum*, quæ dici potest *lex gentium*, vulgo autem *Jus Gentium* appellatur. Præcepta utriusque eadem sunt.” &c. &c.

So also Barlemaqui “Il faut donc dire que le Droit des Gens, proprement ainsi nommé et considéré comme une loi qui émane, d’un Supérieur, n’est autre chose que le *droit naturel* lui même, non aux hommes, mais aux Peuples,” &c.

Principes du droit naturel, 2. 6. 5.

(*e*) Quod *naturalis Ratio* inter Omnes homines constituit, id apud omnes perquam custoditur, vocaturque *Jus Gentium*, quæ quo jure *omnes gentes* utantur. Dig. 1. 2. 1.

*Jure Naturali*, quod appellatur *Jus Gentium*. J. 1. 2. 1.

Thus also, De acquirendo rerum dominio, holds that we acquire Property in the Birds and Beasts which we take by the Law of Nations; observing that the *Jus Gentium*, cum ipso genere humani præditum est. Dig. 41. 1. 1.

“Law

“ Law of Nations. It is still the dictate of right  
 “ reason, applied to the wants of societies. So that  
 “ what used to be called *Jus Naturæ*, becomes *Jus*  
 “ *Gentium*.” (f)

Spacious, however, as this reasoning appears, and sound as it may be allowed to be, as far as it goes ; it is probably not difficult to demonstrate that something more is necessary than a simple view of the Law of Nature, before we consider ourselves obliged to yield obedience as to a *Law*, to those customs which govern the intercourse of Nations.

Whoever casts his eye over the innumerable forms and particularities, which the states of the world consider themselves bound to observe in certain situations ; the *changes* in those forms ; the partial or the general observance of them ; and the varieties of conduct which evidently spring from *positive Agreement* ; can hardly be led to a firm belief that the Law of Nature alone, points them out for our regulation. The Law of Nature is considered besides, as *immutable* ; *imprescriptible* ; and existing through all time ; (g) (a point which we shall soon have occasion to consider more at large ; ) but the difference between the Law of Nations *now*, from what it *has been*, must at once overthrow the position. For example ; it was part of the Law of Nations formerly, to admit of the reduction of captives to slavery ; and that upon the supposed right of putting them to death : Yet a nation which in these times should venture upon such acts of barbarity, would not fail to draw down upon it, the execration, and possibly the perpetual war of its neighbours. This conduct however is justified according to the *law of nature*, by all jurisprudential writers. To consider it therefore as a breach of the

(f) Taylor's Civil Law, p. 128.

(g) Taylor's Civil Law, 129.

*law of nations* ; or to hold it out as matter of detestation, because it is a breach of them ; can only be founded upon the supposition that the latter law is very different from the former. It has indeed been well said by *Puffendorf*, that the right to do any particular thing, imposes upon us not the necessity for doing it ; and hence it may be argued that this abstaining from the execution of prisoners in War, is still agreeable to the Law of Nature, though pushed to its extent, that law might permit us to do much more. But if we abstain from this *full* exercise of the right, and that, in consequence of the *law of nations*, which would be shamefully broken if we did not ; it shews that the two laws are essentially different ; and if the one may be said to be only *less* in extent than the other ; it is different, from the very circumstance of its being *less*. (h)

How it came to be thus circumscribed ; how the full force of the liberty enjoyed in a state of nature, came to be opposed by certain Institutions which are, or ought to be, invariably observed ; are questions not so easily answered, except by acknowledging that Man has appointed this circumscription by his *Civil Sanction* ; which *Dr. Taylor*, in the passage above cited, allows to be not *Natural* but *Instituted* Law.

In a State of Nature ; that is, acting under the Law of Nature alone ; if it be necessary to make war, war is made without any notice but the very act of hostility. Among Nations, (though doubts are en-

(h) Vide *Rynkerhoek*. *Quest. Juris Pub.* “ Sed mores Gentium qui olim fuerunt et nunc sunt, sollicitè distinguendum est Moribus censetur, precipua pars *Juris Gentium*.”

Hence the opinion of *Grotius*, reasoning on the Inviolability of Ambassadors. “ Bonum et æquum, id est merum *Naturæ Jus*, patitur pœnas exigi, ubi reperitur qui deliquit ; at *Jus Gentium* legatos, et qui his similes fide publica veniunt, excipit. Quare ut rei fiant Legati, contra *Jus est Gentium*, Quo vetari multa solent, quæ *Jus Naturæ* permittet.” *De J. B. et P.* 2. 18. 4. 3.

certained



tertained by many on the soundness of the point,) those who make war by sudden ravages, are considered as *Robbers*, and may be punished as such; and accordingly, from the oldest time, a solemn form which stamps a State with the terrible character of *Enemy*, has been deemed necessary before it can proceed to acts of *legitimate* War. In a State of Nature, if once in consequence of just hostility, we are permitted to kill an Enemy; it should seem that the manner of doing it, was indifferent; under the Law of Nations however, nothing is more expressly forbidden than the use of *poisoned* arms. In a State of Nature, it would appear, that whoever assists my enemy, though only to a certain point; by the very act of assistance, becomes my enemy also: and even under the law of nations in *other* times, such doctrine was held reasonable; In the days of modern refinement however, it is not considered as a breach of those laws, nor a sufficient cause for War, to lend aid to one State against another, when bound to do so by *Treaty*. (1)

In reasoning upon many of these customs, it would possibly be a task not more unnecessary than vain, to endeavour to trace them up to the law of nature. In many points that law absolutely withholds its decision; and leaves us often to chance, where precedent is wanting, to determine upon a rule by which millions perhaps are to be governed. For example; on the discovery of uninhabited lands; though the *Law of nature* may prescribe some act of possession to those who wish to establish themselves there; it cannot possibly determine what shall be the particular form to constitute a legal property, in the eyes of the rest of the world. That form, it is left absolutely to the Law of Nations to settle; and it may be any trivial

(1) See more upon this point, when we come to the Influence of Treaties on the Law of Nations.

thing which chance, or accident, or caprice may point out. Not only this, but immense tracts of Land, which have never even been seen; Seas and Rivers that have never been explored, are often claimed to the exclusion of others, merely on account of a partial discovery of them. Of the same nature with this are a vast number of *Ceremonies*, and *maxims*, all of them forming part of the *Law of Nations*; but wholly independent of the *Law of Nature*; as, the particular forms of declaring War; the distinguishing marks of *Heralds*, and *Flags of Truce*, in order to shew the pacific intentions of those who bear them; the *precedency* of different nations according to the forms of their government, whether *Imperial*, *Monarchical*, or *Republican*; the *Ceremonies of Courts*; the *Credit* attached to certain documents supposed to confer high privileges on those who are furnished with them; (as the *Credentials of Ambassadors*;) the great *immunities* of those *Ministers*, (not absolutely necessary for the success of their mission, but) agreed upon by different nations; the proportion of *Salvage* allowed to a nation that recaptures the property of another, with whom there is no *Treaty*, from a common enemy; all these, are surely the effect of *Convention* (*k*) of some sort or other; and by no means pointed out by natural right. “*Natural Law*,” says *Bynkershoek*, “establishes neither distinction of persons, nor property, nor civil government; it is the *Law of Nations* which has invented these distinctions, and renders all those who happen to be within the territory of a State, subject to the

(*k*) “C'est le *consentement* de toutes les Nations de la Terre qui fait ce qu'on appella le droit des Gens. Il tient le milieu entre le droit Naturel et le droit Civil; et est d'autant plus considerable que le dernier, qu'il ne peut estre changé ni alteré, sinon du même *Consentement* unanime de tous les peuples.”

Wicquef. de l'Ambassadeur. l. 1. 27.

“ jurisdiction of that State. *Reason and Custom*  
 “ are the only Bases of the *Law of Nations*.” (l)

Of this opinion also, and in all its extent, seems to have been a writer of great perspicuity and comprehension of mind, though his writings are seldom explored. I mean FRANCISCO SUAREZ, a famous Jesuit of Grenada, in the sixteenth century, and long time professor of divinity in the University of Conimbro.

I shall make no apology to the learned Reader for setting before him the following of his positions.

Natural law, differs from other laws in this ; that other laws, *constitute of themselves* the turpitude or honesty of the things they prohibit or inculcate ; while Natural law, always *pre-supposes* in the act or subject, the turpitude which it prohibits and the honesty which it inculcates ; and therefore we usually say that a thing is forbidden by this law, *because* it is bad, or commanded, *because* it is good. (m)

Now it is to be believed, that the *Law of Nations* does not command or prohibit things because they are *intrinsically* good, or *intrinsically* bad ; for such things belong properly to *Natural Law* ; and in this sense therefore the *Law of Nations* is not comprehended in *Natural law*. (n)

(l) Bynk. de Foro Leg. Cap. 24.

(m) Vide Fr. Suarez. De Leg. ac Deo Legislat. L. 2. C. 7. S. 1. Imo in hoc differt lex naturalis ab aliis legibus, quod aliæ *faciunt* esse malum quod prohibent ; et necessarium vel honestum quod præcipiunt ; hæc vero *supponit* in actu seu objectu, honestatem quam præcipiat, vel turpitudinem quam prohibeat ; et ideo dici solet per hanc legem prohiberi aliquid quia malum, vel præcipi quia bonum.

See also other opinions to this purpose. Puffend. Droit des Gent. L. 2. Ch. 3. §. 4.

(n) Concludendum igitur confecto, *Jus Gentium*, non præcipere aliquid tanquam ex se necessarium ad honestatem, nec prohibere aliquid quod per se et *intrinsece* malum est, vel absolute, vel tali supposito Statu et conditione rerum ; sed hæc omnia pertinere ad *Jus Naturale*, ac Subinde in hoc sensu, *Jus Gentium*, non comprehendi Sub jure naturali. Id. 2. 17.

The Law of Nations differs in the first place and that very particularly, from *natural* law; in so far as it contains certain *Positive* precepts, the necessity of which it does not infer *solely* from the *nature* of the thing inculcated, by an inference drawn from *natural* principles; and as we have shewn that every thing that is thus inferred, must be attributed to *natural* law; some other cause for this necessity must be sought for by the law of Nations.

It differs in the second place, because it cannot be so *immutable*, as the law of *nature*; for *immutability* takes its origin from Necessity.

Hence lastly, it follows; that even in the things in which the two laws appear to agree, they are not exactly, and every way similar. (o)

Such is the opinion of the Philosopher of Grenada, and he adds to it a slight enumeration of those points which form the subject of the law of nations, but on which nothing is decided by *natural* law. Most of them have been mentioned above, and among them he particularly takes notice of the privileges of Ambassadors (p), and the necessity under which the world is supposed to be by the law of *nations*, and not the law of *nature*, to cultivate commerce. (q)

(o) Differt autem primo ac præcipue *Jus Gentium* a *Jure Naturali*: Quia quatenus continet præcepta affirmativa, non inferit necessitatem rei præceptæ, ex sola rei natura per evidentem illationem ex principiis naturalibus; quia quicquid hujusmodi est, *naturale* est ut ostendimus: unde necesse est, ut aliunde oriatur talis necessitas, &c.

Secundo differant consequenter, quia *Jus Gentium*, non potest esse tam *immutabile* sicut *naturale*, quia Immutabilitas ex necessitate oritur.

Tertio hinc fit, ut etiam in his, in quibus hæc jura convenire videntur, non habeant omnimodæ similitudinem.—Id. L. 2. C.

19 3.

(p) Id. 2. 19. 6.

(q) *Jus naturale per se*, ad hoc (*Commercium*) non obligat; potuisset enim una Respub. per se vivere, et nolle *Commercium* cum aliâ, etiam si non esset inimicitia.—L. 2. 19. 7.

Thus



Thus much then with respect to those who favour the supposition of *Hobbs* and *Puffendorf*, that Man rose suddenly from the Earth, or dropped from the clouds, with all his Faculties perfect, and beheld other beings around him, of the same species, and in the same situation.

But to those who lend their belief to the tradition handed down to us by our Fathers, in the most complete as well as the most venerable monument of Antiquity extant in the world; little reflection is wanting to shew, that reasonable doubts may be entertained, whether mankind ever existed in any state where certain customs were not known and complied with; and if so, the law of *nations* must, even at all times, have been different from the mere law of *nature*.

The history and origin of Government and Civil Society, have been topics, so often handled, and the subjects of so much learned and ingenious discussion, that it would be little necessary to touch upon them here. But if we believe in the MOSAIC TRADITION, and give our assent to that wonderful force of corroborative circumstances which are supplied by the history and the face of the Earth; we can hardly imagine the accounts of the State of *nature* above mentioned, to be any thing more than the wild images of Poetry, or at best an invention for the more convenient deduction of certain reasonings on Law and Right.

Upon the supposition then that the world was peopled by a single pair, and of course that every man except the first, must have gradually advanced through a long and weak infancy, to the full use of his faculties in body and mind; it is hardly possible not to believe, that Government and Society (of what sort is not here the enquiry) are as old as the world itself.— And however soon the emigration of children from their fathers, or of particular families from their community, may have taken place; still, the existence

ence of certain customs and ceremonies, and even of rules and laws, must be supposed coeval, or nearly coeval, with the existence of mankind.

This latter consideration, is what I do not recollect to have seen in any of those theories which make a difference between the laws of nations and of nature ; nor is it offered as conclusive argument, but merely as strong collateral evidence, the weight of which must in every man's mind depend upon the inclination of his opinion with respect to the manner in which the world was peopled.

So strong was the impression with GROTIUS, that the law of nations was the *custom* of nations, exclusive of the dictates of nature ; that a writer of great weight (*r*) has imagined him to have pushed this theory too far, and to have rejected the interposition of natural law, more than was reasonable.—And indeed in the following sentiments, we may suppose him to mean that the States of the world form one great federal community, which has actually determined upon one common, definite Code of Laws for its government.

“ As the laws of every State,” says he, have a  
 “ view to the particular interest of that State ; So  
 “ among the States of the world, or the greater num-  
 “ ber of them, certain laws may be agreed upon (*ex*  
 “ *consensu*) which have a view to the interest, not of  
 “ single Communities, but of the great whole ; and  
 “ this is what is called the law of nations as often as  
 “ we distinguish it from the law of nature.”

Again, “ whenever we observe a settled maxim  
 “ put in practice by numbers at different times and  
 “ places, we must attribute it to some universal cause ;  
 “ which in the subject before us, can only be by mak-  
 “ ing it flow immediately from *natural* principles ; or

(*r*) Vattel in pref.

“ the

“ the *common consent* of the world. The one points out what is the law of nature; the other what is the law of nations; for it follows of course, that what is not deducible at once by reason, from certain fixed principles, and yet is universally observed; must derive its force from *voluntary consent*. I have therefore been careful,” continues he, “ to distinguish the law of nations from the law of nature, as well as from the civil law.” (s)

In this opinion, the Philosopher of *Delft*, may be thought to have gone too far; since though there can be little doubt but that *Convention* enters into the composition of the law of nations; it can hardly be denied that there is much force in the opposite *Theory*; and though the transactions of nations are governed by custom in a vast variety of points; yet *in the beginning*, and even now, *in affairs that are without precedent*, above all, in points of general duty and conduct, they can have nothing to follow but such laws as individuals *not connected together in civil society are bound to observe*. (t)

Steering therefore equally clear of the inaccuracy of the *Roman Lawyers*, and some modern authorities; and this opinion of *Grotius*, that the Law in question is *Instituted Law*, and that alone; we shall not perhaps err much in inclining *for the present*, to the more recent Sentiment, that although the law of Nations is to look for its principles to the Law of Nature, and Sovereigns are to be governed in their general line of conduct, *and in all particular cases that are new*, by the same principles as would govern independent individuals; Yet, that many customs have been adopted, and many maxims agreed upon, we are to look to *them*, in those cases where they present themselves, for

(s) Prolegom. Sec. 17. 41. 42.

(t) What that law is, we shall enquire more at large in a future chapter.

the interpretation of the principles. (*u*) I say, *inclining for the present*, because we mean hereafter to enter upon a full discussion of the Law of Nature, and to endeavour to settle more accurately than has hitherto been done, what we are to understand by it, and under what modifications, when we speak of it as the foundation of the law of Nations.

Thus then the law of nations may be said to be constructed in the same manner with various parts of other laws, which are not written, but derive their force absolutely from Equity and Custom, (*x*) of which, a very great proportion of the law of this realm, (surely far different from the *mere* law of nature) is an illustrious example.

There are indeed cases perpetually happening, in which various modes of action present themselves, all equally recommended by nature and reason; and in which, it is not of so much consequence to determine upon any one of them from a thorough conviction of its superiority; as that something definite shall be determined upon. In these cases, it is evident that if nature and reason recommend them all; the selection can be only made by the sanction of *positive* law. The end is pointed out by the one; the means are adopted by the other; the principles are founded in *reason*; the application, is absolute *institution*; so that the whole together, form a composition of the laws of *nature*, and the laws of *man*. I have alledged," says *Bynkershoek*, (upon the Inviolability of Ambassadors) "whatever reason can adduce for or against the question; we must now see what is

(*u*) In the same manner as (with us in England) it is an Act of Parliament which prescribes the general terms of a law, but it is the Courts of Justice which are charged with its interpretation; and the Act, and the interpretation (in the cases that have been actually decided) *taken together*, form the law.

(*x*) See Grot. de Jur. Bel. P. 1. 1. 14. 1.

really



really to be determined; what *Custom will have settled will carry it without doubt*; since it is on *Custom* that the law of nations is founded; (y) and indeed whatever may be the definition of this law, we must always return to this; that, that which reason dictates to the people of the world, and that which they *observe* in consequence of a comparison they make of the things which have happened, form the sole law for those who have no other to follow. If men only make use of their *reason*; reason will but *advise* certain things to be observed by them; which *being thus observed*, so as to become established *Customs*, people are under a reciprocal obligation to comply with them, without which we cannot imagine either War, or Peace, or Alliances, or Embassies, or Commerce." (z)

Such is the language of one of the ablest writers on this part of law, who saw clearly how different the modifications of certain Customs must render the mere law of nature. The sentiments contained in the small Treatise which he gave to the world, were ably developed by WOLF, (a) and put into more polished form by VATTTEL; from whom if we differ at all, it will only be in endeavouring to give something more definite and binding even than this assemblage of the laws of *Nature* and the laws of *Man*, as the *real* foundation of the Law of Nations,

In this stage of the arguments, it may not be improper to take a view of an objection, whose force, if allowed, would overturn the whole of what has been said. It is to be found at large (though it was thought of long before by Suarez,) (b) in Dr. Taylor's learned Treatise on the Civil Law, in which he has occasion to consider the questions before us. The following is the Sum of his reasoning.

(y) Bynkersh. De For. Leg. C. 7.

(z) De For. Leg. C. 3.

(a) Jus Gentium.

(b) De Leg. ac Deo Leg. 2. 18.

The Law of Nature is divided into *absolute* and *Hypothetical*. The one obliges *absolutely, all persons, at all times and in all places, for it is immutable*; the other only *conditionally*; that is, supposing such and such conditions to exist; which, if they do not exist, nothing is done. But if they are just and reasonable in their own nature when they do come to exist, the obligation to observe them operates as strongly, as the obligation of the Law of Nature did in its absolute force. (c) This reasoning is thus illustrated by Cases.

The Law of Nature recommends the advantages of Society. When therefore Society is formed, and not before, *all the means of maintaining it, and all the consequences that flow from it, are as much the Law of Nature, that is, the Law of Nature Hypothetical, as the rules before it, were the rules of the Law of Nature absolute.* (d) So also with *Contracts*; the observance of which is not in consequence of any *new* Law, but merely that an *eternal and necessary* Law, has now a Scene in which it may exert its operations. (e)

When writers then tell us of a *secondary* Law of Nations, which in many respects is totally different from the *primary one*; this is the true and natural observation upon that seeming disagreement. If I am directed to cultivate Society, I find there can be none without a separation of property; Property introduces disputes; disputes are the occasion of war; war brings on Captivity; that again Slavery; till we come by the benefit of manumission to the recovery of our *natural Rights*.

This scheme has led people to imagine that the *secondary law of nations* was a kind of *conventional, voluntary*

(c) Taylor's Civ. Law. Quarto Edit. 129.

(d) Taylor's Civil Law. 129.

(e) Id. 130.

*tary law*, distinct from the law of nature. But though the natural equality of mankind, and the admission of Slavery; the community of goods, and the introduction of property; and many other customs compared with natural right, seem in opposition to one another; yet, if the rights and duties of this *new scene*, are not *incongruous* with the law of nature; what is called the *secondary law* of nations “has really no existence; nor can that be said to be introduced by positive or arbitrary contracts, or by voluntary confederacies, which is fairly the pre-“scription of right Reason.” (f) Hence all the obligations which arise from what is called the *Jus Secundarium*, were virtually laid upon us before, but could never be known till something called them forth. Thus *theft* is contrary to the *law of nature*, though it could not be known till after the institution of *Property*; for the doctrine of “*Alterum ne lædas*” loses no force; So that when the Civilians say that *Theft* is base in its *Nature*, they mean that *it would be so*, after *Property* was once introduced. (g)

To this reasoning little can be answered; since if taken in one light, it cannot apply to the question before us, and therefore requires no answer; if in another, it is every where contradicted by fact. If it means that men have really no view to rule and precedent in their conduct towards one another; it would be useless to endeavour to prove that they had, when rule and precedent every where present themselves to notice. But if it means merely to trace *all* Laws up to their source and reason, and to assert that they are *Laws of Nature*, because the na-

(f) Taylor's Civil Law. 130.

(g) Id. 131. See also Suarez de Leg. ac Deo Legislat. L. 2. C. 18. Nam multa sunt de jure naturali quæ non obligent, nec locum habent, nisi aliqua suppositione facta. Ut præceptum *non jurandi*, non habet locum, nisi facta divisione bonorum et dominiorum.

ture of man makes him propose some advantage to himself in *all* his constitutions ; there can then be no question between us. In that view of the subject, all the laws that ever existed, may be deemed laws of nature ; and the laws of a particular State, a particular District, nay even of a particular *Society* or *Club* of men, may be said to be laws of nature, as well as the laws of nations : For they are all founded upon the natural inclination to uphold Society ; they are the means of *maintaining it, and the consequences that flow from it*, which to use the language of the argument are the laws of nature.

To those however who do not regard the question in this extensive point of view, but merely enquire whether the particular form in which the principles of natural duty are applied, must not have the *civil sanction* of men to stamp it with the authority of *law* ; this reasoning will appear, if not nugatory, at least gratis dictum. (*h*)

As therefore the principles of all civil and municipal laws, must be founded in natural reason, but derive the form and manner in which they are brought into use, from *positive institutions* ; So also the law of nations must put in force the dictates of nature, in some *known mode* agreed upon by all who conform to them. The only difference is, that in the one case, it is individuals who are called upon to settle the mode ; in the other, it is whole nations, acting through the organs of their governments ; that in the one, almost every thing that can exercise the judgment of an individual in his various relations, is settled for him by written law, or by precedent ; while among States, (from their comparatively little

(*h*) It was Gibbon's judgment of Dr. Taylor's work, that it was of amusing, though various reading ; but could not be praised for philosophical precision.

Dec. and Fal. Ch. 44. Note. 132.



intercourse, and the want of a *common Sovereign*,) much is left without precedent, wavering, as accident, or whim, or the varying ideas of natural justice, may direct.

Upon the whole then, the account of the Law of Nations, is not greatly different from that of the *Municipal*, which by all writers is considered as *positive* law. For both the one and the other look for their principles to *Reason*; for their application, to regular *Institution*; and hence a writer of the last age has said, not improperly, that the Law of Nations holds the midway between civil law and the law of nature. (i) When however they come to be broken, the difference is far more serious. The breach of *municipal* law is attended only by the punishment of the offender; (the law remaining still in force strengthened perhaps by the very infraction :) the breach of the other, can only be remedied by the refusal of those who are injured to comply with it any longer, and the law itself is totally destroyed.

(i) Wicquefort de l'Ambassad. 1. 1. 27. Suarez also calls it medium inter naturale jus, et humanum, et priori extremo vicinius. L. 2. 6. 17.

## CHAP. II.

## OF THE OBLIGATION OF NATURAL LAW.

**BUT** a very material question presents itself now for discussion, which must be satisfactorily disposed of before we can proceed farther. Although it may appear settled, that the Law of NATIONS consists of the Law of NATURE, modified by the express or the implied consent of Nations; still if it should happen that the *particular* sets of actions and offices which compose what is called the moral science, and which are expressly said to take their rise and obligation from the Law of *Nature*, should not always resemble one another: If different philosophers, proceeding as they think from this same Law, should be found to have very different ideas of duty; and nations in consequence have adopted in the same situations, very *different* modes of conduct: If this, I say, should happen, we must I think be driven to confess, that the *law of nature* itself, is a very imperfect foundation for any Law which is supposed to be definite and certain; and which on account of that foundation, and that alone it is affirmed, is to govern *all the States of the World*.

A very able writer upon the subject of Laws, conceives the Law of Nations to depend upon the principle, “ *that different nations ought to do as much good to one another in peace, and as little harm as possible in War, without prejudicing their real Interests.*” (k)

As a great fundamental principle, or out-line of the Law of Nations, I have no kind of doubt of the

(k) Montesq. De l'Esp. des Loix. l. 1. ch. 3.

foundnes.

soundness of this proposition; but when we come to *a detailed scheme of duties*, it is obvious that much more is necessary to render it *definite*, since it is obvious that a question may be immediately started, namely, what is it that constitutes our *real Interest*, and *who is to judge?*

Now could the Natural Law point this out with certainty to every man's heart and comprehension, there would be little or no difference of opinion concerning it for the Natural Law, as is properly and uniformly laid down, is *universal* and *immutable*. Yet we all know the immense diversity of sentiment concerning *real Interest* which there is, and must be, where there is no common *positive* Religion to decide upon it with authority; and in speaking merely of a *natural* Law, all idea of such a religion must be left out of the question. (l)

Even with a positive Religion, much difference of opinion has arisen upon various points of the Law of Nations. For example; one of the reasons which produced the Treatise of VATTTEL, was a revolting assertion of *Wolf* (whom he owns for his Master) that *the use of poisoned arms, was legitimate in war.* (m) Some of VATTTEL's own positions in other parts of his subject, seem to me, on his own principles, to be equally capable of contest. For example, he founds the *natural* obligation of Nations to cultivate commerce, solely upon its *utility?* and though he owns that one nation may refuse to trade with the rest, yet if it do so without *good reason*, he affirms it will be guilty of a breach of duty. (n)—But if *utility* is the sole cause of this obligation, it must be obvious that its *universality* must entirely depend upon this, that *all* mankind consider commerce in the same

(l) See Note c. page 4.

(m) Vattel Dr. des Gens. Prelim. 13, 14.

(n) Vattel Dr. des Gens. Prelim. l. 1. ch. 8.

light with VATTTEL, which is known not to be the case. (o)

Who then can decide with clearness upon the Law of Nature itself, when extended into all the minute ramifications of a particular System, upon which *all* mankind are by no means agreed?

A great and very old question therefore arises, concerning the OBLIGATION of NATURAL LAW *as far as it is supposed to tie us down to the observance of one, certain, and detailed scheme of duties, and no other*: In other words to the pursuit of what *particular* Nations call GOOD, or the rejection of what they call EVIL. If this cannot be shewn, we have as yet obtained absolutely nothing, concerning ONE FIXED foundation, for a Law of Nations, binding, *ex vi terminorum*, upon all the Nations of the world; and as most of those learned men who have acquired such deserved reputation for their researches upon the subject, have generally taken this part of it for granted, there may be yet something wanting to the perfection of the Science.

In the present Chapter therefore I shall endeavour to examine, the force of the OBLIGATION which many judicious and virtuous persons have asserted we are *all* of us under, to observe invariably *one particular, and certain* set of Customs, from the commands of nature alone. And if it shall be found that this obligation is at best but a weak one; or that upon the same principles which are supposed to recommend it, very *different* sets of Customs may be, and are pursued with equal zeal; it is clear, I think, that with such a sort of *obligation*, we can arrive at nothing determinate with respect to the Law in question. Should this be the Case therefore, I shall af-

(o) Suarez, as quoted in last Chapter, (Note g. p. 11.) asserts in positive terms, that there is no *obligation* to cultivate commerce at all.



terwards endeavour to come at what is likely to be the truth ; and to point out whether what is commonly called the LAW of NATIONS, is binding upon *all* the World, or only upon particular *Sets* or *Classes* of Nations, as they fall into different divisions of it, observing different Religions and pursuing different systems of Morality.

Preparatory to so important an enquiry, and in order to clear the question in the outset from seeming objections, it will be necessary perhaps to state in form one or two *obvious* propositions; nor shall I be at all afraid of the danger of repetition, provided at the expence of being prolix, I may be certain of being perspicuous; since all who have attended to speculations of this sort, must have perceived how much difficulty has often been occasioned, by the writer's taking for granted that certain things are *already* understood, and that the exact question is *already* known by the reader.

That we may therefore the more easily understand the following considerations, it will perhaps be right to make a division of the Law of Nature, (which is a term of immensurable extent) in order to come at once to what is the exact point of our enquiry.

The Laws of Nature then, may be divided into those which concern *animate* and *inanimate* Being: the first of which only, is the subject of our speculation.

The laws which govern this again, may be divided into Instincts and Reason.

Instinct without reason, is the law for the Brute Creation.

Instinct and reason together, form the law for MANKIND.

Thus, Man has as it were two natures. One in common with Brutes; inasmuch as he obeys the laws of Instinct; another peculiarly his own, inasmuch as he consults the laws of reason.

Between

Between these two, there is this characteristic difference; that instinct acts with irresistible power, while reason only directs or advises, and may be perpetually opposed. Hence, under the one, we are a blind and passive; under the other, we are a free agent; and it is to those Cases alone which come under the direction of reason, (that is, to Cases which admit of a free agency,) that our enquiries are directed.

Hence then upon the whole, the point before us, is to ascertain if possible, whether the duties and actions which we denominate *Moral*, (as that a man shall love his neighbour as himself,) can be said to be *obligatory*, from what is called the Natural Law alone, “considered as distinct from the positive institutions of man,” (in other words, from Expediency or Utility,) or the REVEALED commands of the Deity.

A vast body of authorities, venerable for their age, their learning, and their powers of argument, hold the affirmative of this Question. At their head, appear the whole band of STOICS, and the followers of SOCRATES and PLATO of ancient times; and among the Moderns, the names of SUAREZ, PUFFENDORF, HOOKER, LOCKE, (p) CUMBERLAND, BURLEMAQUI, VATTTEL, TAYLOR, and above all, the profound BUTLER.

These again are opposed by another great body of authorities, which are no doubt well known to the reader; and which, however they may differ from them in the main points of their philosophy, are not to be neglected totally, or without discrimination. The philosophers I mean, are the PYRRHONIANS, the EPICUREANS, and the SCEPTICS of antiquity; the Disciples of HOBBS, SPINOSA, MONTAIGNE, DES CARTES of later days; and several others who

(p) On Government.

are remembered within our own age. We proceed to enquire into the difference between them.

The opinions of the first mentioned class of writers are founded upon the following argument.

Whatever is discovered to be the practice of the whole, or nearly the whole of mankind, and to proceed upon a certain known, general, and fixed principle, must be in consequence of some law, which may fairly be called the law of man's nature. (g)

Now there is an *universal* principle of action in the hearts of all mankind, which is to seek happiness as *social* and *benevolent* beings.

This may be drawn from a review of the internal frame or constitution of man, which leads him, when unbiassed by his own particular interest, to wish the happiness of *all* his fellow-creatures; to approve of virtuous actions wherever he observes them, and to detest their opposite vices. This approbation, and detestation, are imposed upon him by a certain internal, great, and regulating principle, called CONSCIENCE or reflection; which, though his passions may lead him often to rebel against its power, it is nevertheless impossible wholly to blind or to destroy.

This great principle, adjusting and correcting all inward movements, ought to preside over and govern them; It is the instrument by which man is to be shewn what his real nature leads him to; and obligations to the practice of virtue deduced from this review of nature, "are to be considered as an appeal to each particular person's heart and natural conscience; as the external senses are appealed to for the proof of things cognizable by them. And thus, allowing the inward feeling *Shame*, a man

(g) Grot. J. B. p. 1. 1. 12. Puffend. 1. 6. 10. & 5. 3. 10. Barbeyr. Pref. to Puffend. p. 14. Hooker Eccles. Pol. B. 1. Sec. 8. Vattel. 1. 27, 28.



“ can as little doubt whether it was given him to  
 “ prevent his doing *shameful* actions, as whether his  
 “ eyes were given him to guide his steps.” (r)

The truth of this opinion may also be drawn, from the comparison of the nature of man as respecting self, and as respecting society; by which it will appear “ that there are as real and the same kind of  
 “ indications in human nature, that we are made for  
 “ society and to do good to our fellow-creatures;  
 “ as that we are intended to take care of our own  
 “ life and health and private good; and that the  
 “ same objections lie against the one, as against the  
 “ other,” (s). For though crimes are often committed against society; so are they often committed against ourselves, by intemperance and other excesses; and as there is really no such thing as absolute self hatred; so there never was an instance of ill will, *for its own sake*, against mankind. Moreover, our passions and affections, considered merely as *private* by ourselves; are in fact, *public* passions and affections also. Thus, the desire of esteem from others; the love of society; (*considered as distinct from the good of it*;) and indignation against successful Vice; these are *public* passions; relate to others; and lead us to regulate our behaviour so as to be of service to our kind. And thus the general disposition of our inward frame, is calculated to do good to our fellows, as well as to ourselves; and any thing contrary to this in either case, is not to be considered as *le-*

(r) Butler's Second Sermon on Hum. Nat. Sermons. p. 26, 27, 28. Barbeyr. Pref. to Puffend. p. 4. Il ne faut presque pas sortir de soi même, ni consulter, d'autre maître, que son propre Cœur. Burlemaqui goes so far as to deduce Virtue and Justice from mere Sentiment and Taste, which, says he, forestal reason. Dieu a donc jugé à propos d'employer aussi cette voye à l'égard de la conduite morale de l'homme; et cela en imprimant en nous, un *sentiment*, un *gout* de Vertu & de Justice, qui prévient en quelque sorte le raisonnement.—Du Droit Nat. 2, 3, 5,

(s) Butler's First Sermon on Hum. Nat. p. 5, 6.



*gitimate*, but as the effect of mere ungoverned passion. (*t*)

That this sort of ungoverned passion, (though apparently natural,) is in reality contrary to nature, is discoverable first, from an attention to the various meanings of the word Nature; and afterwards by fixing the true one, which forms the subject of the speculation. For it does not mean merely, *any* principle in man, without regard either to the kind or degree of it; (such as the passion of anger or the affection of a Father for his children, which may both be called *natural* :) neither does it mean *merely* those passions which are *strongest* in a man, (in other words his ruling passion,) which is often and justly enough put for the *nature* of some *particular* man; in which light nature may be vitious, as well as virtuous. (*u*) But it means, that *reasonable, reflecting*, nature, which teaches men to do that which SELF demands of them, “after a view of all its consequences;” by which it will never suffer them to prefer a mere momentary gratification, at the expence of future destruction; but something that shall be gratification on the long run, all general consequences considered as much as they can be, which therefore ought to embrace the interests and the right of others.

This is the nature which is meant by the speculation; and in this point of view, what in common speech may be allowed (though inaccurately) to be natural; may in the end turn out to be quite the reverse. Thus, though a brute rushing into a snare for the sake of a bait, may be said fairly enough to pursue his nature; since it was natural for him to wish for the bait, and it was not in his nature to foresee the consequences;—Yet it is not so with man; who being endowed with reason, and governed magiste-

(*t*) Grot. D. J. B. P. Prolegom. 6, 7, 8, 9.

(*u*) Butler's Sermon. p. 33, 34.

rially by the principle of reflection or CONSCIENCE, "which without being consulted, approves or disapproves of a thing, and renders man a law unto himself," (x) is bound to give up present gratification in order to avoid certain ruin; and should he chance not to do this, such an action is nevertheless evidently *disproportionate* to such a reasonable nature, and therefore in the strictest sense, is *unnatural*.

But as the natural passion to gratify self-love upon the long run; (that is, the duty to avoid present pleasure, for future preservation,) would incline a man to do this, however strong his natural passion for pleasure might be on the other side, and even although it absorbed all others; it is evident that there is a difference between a REAL and REASONABLE self-love, and that which is only deceitful; that is, *mere passion* which looks not to consequences. This difference, not depending upon strength, or degree, must be a difference in *kind*; and as, if such passion as has been described, prevail over self-love, it is *unnatural*; (*disproportionate*;) while if real self-love prevail over passion, it is natural; it is manifest that the TRUE and REASONABLE self-love, is a *superior* principle in nature to mere blind passion. Hence therefore, though it may be borne down by it, it is not the less superior in its *nature* on that account; and the power of passion must be considered as *usurpation* only, in the same manner as in civil society it sometimes happens, that a rebel who is more powerful, usurps the Government of a lawful Sovereign; who however is not the less a lawful Sovereign on that account; neither is *power* considered as *authority*. (y)

As therefore the idea of a civil constitution implies united strength, and various subordinations,

(x) Butler. Sermon. p. 36, 37.

(y) Butler. Sermon. p. 39, 40, 41.

under one head ; namely, that of the Sovereign ; and if you leave out the subordination, though all the members remain, yet the idea of civil government is destroyed ; so reason, appetite, and passion, considered without connection or arrangement, do *not* give the idea of human nature ; but that nature consists in a certain *arrangement*, or *relation* which all these parts bear to one another ; under which the passions or appetites, are to be considered as *subordinate* to reason and conscience. And as a civil government may be destroyed by a rebellion, the success of which does not render it legal ; so also may the constitution of nature ; in both cases, the nature of what *ought* to be, remaining the same, notwithstanding what is.

Hence, *exclusive of revelation*, Man is not a Creature left by his maker to act at random, and live at large up to the extent of his natural power, as passion, or humour shall direct ; but from his make, constitution, or nature, he is in the strictest, and most proper sense, a law unto himself : he has the rule of right within, all that is wanting is, that he honestly attend to it. (z) And therefore enquiries after any *general* rule by which our actions may be denominated good or evil, though in many respects they may be of service, are of little with respect to this ; since any plain honest man before he engages in any course of action ; if he only ask himself whether what he is about to do is right or wrong, good or evil, “ will “ be able to answer the question agreeably to virtue “ and truth, in almost any circumstance.” (a)

(z) Butler's Serm. 45, 46. et *infr.*

(a) Butler's Serm. 49. Barbeyr. Pref. to Puffend. 2. The last contents himself with saying, that the sciences of morals may be acquired *jusqu'à un certain degré* ; though he adds *par tous ceux qui veulent faire usage de leur Raison, dans quelque état qu'ils se trouvent.*

Thus



Thus it is that the law of nature resolves itself at last into the law of reason ; and hence it is called “ the dictate of right reason, pointing out that a “ thing is morally right, or morally wrong, according as it agrees or disagrees with a *reasonable social* “ nature.” (b) Hence also, (if we must have a rule) there is a certain order, or fitness of things, to the support of **which all actions**, to be right, must ultimately tend, (c) which is called the System of the law of nature ; and which like all other Systems, is a whole, made up of component parts, the several relations of which to one another, produce the idea of what the system itself is. In man this whole, or System, has for its parts, the appetites, passions, and affections, and the principle of reflection or CONSCIENCE, which compose his inward frame ; the relations of which to one another considered, produce the idea of what his inward frame or constitution is, from which it appears plainly, that it is adapted to VIRTUE. (d)

Lastly, as this must be an UNIVERSAL and IMMUTABLE law, or cease, from the terms, to be the law of nature ; every man whoever lived, “ whatever “ may be his ideas concerning the formation of “ things : even should he have the misfortune to be “ an Atheist, is bound to obey it.” (e)

Such is the argument of a great and respectable body of writers, who would prove a priori, from *their* ideas of the reasonable social nature of man, that the law of that nature obliges him to the practice of virtue

(b) Jus Naturale est dictatum rectæ rationis, indicans actui alicui, ex ejus convenientia, aut disconvenientia, cum ipsa natura rationali ac sociali, inesse moralem turpitudinem, aut necessitatem moralem, &c. GROTI. D. J. B. P. I. I. 10. 1.

(c) See the Relig. of Nat. delineat. p. 128. 6th Edit.

(d) Butler's Pref. to Sermon. p. 10, 11.

(e) Elles (les loix naturelles) sont *certaines, obligatoires*, et sacrées pour tout homme raisonnable ; *abstraction faite de toute autre*



tue and morality, “ according to the ideas which “ are commonly entertained of them;” since in order that there may be no mistake, as to the *particular* duties which they enjoin under those general terms, they go on to lay before us, the whole scheme of offices which men who have been in the habit of cultivating their reason to the utmost pitch of refinement, who have had all the advantages of civilization, and even of revelation, have agreed, after long and laborious research, to call moral.

Thus, we are not only obliged in general terms, by the natural law, to do good, and avoid evil ; to do as we would be done by ; to cultivate justice, and to worship the Deity ; but, coming to particulars, we are to consider as crimes against nature, Adultery, Theft, Fornication, Usury, Falsehood, and every thing that is forbidden by the Decalogue :  
(f) We are bound to avoid intemperance ; to repair  
any

*autre consideration que celle de sa nature ; et quand meme on le supposerait dans l'ignorance totale d'un Dieu.—Il n'est donc point d'homme, qu'elles que soient sees idées, sur l'origine des choses, eut il meme le malheur d'être ATHEE, qui ne doivent se soumettre aux loix de la nature, &c.—(Vattel Prælim. S. 7. in the notes.)*

This is in the same spirit with GROTIUS (Prolegom. 11.) “ Et hæc quidem quæ jam diximus, locum aliquem habent, “ etiam si daremus, quod sine summo scelere dari nequit, *Nullum esse Deum*, aut non curari ab eo negotia humana,” &c.

(f) Vide SUAREZ De leg. ac deo Legislat. L. 2. C. 7. 5.

Nam ea quæ naturali ratione cognoscuntur, in triplici genere distingui possunt.—Quædam sunt prima principia generali morum, ut sunt illa, Honestum est faciendum, pravum vitandum : Quod tibi fieri non vis, alteri ne feceris ; de his nullum est dubium, pertinere ad legem naturalem.—Alia sunt principia, magis determinata et particularia : tamen etiam per se nota ex terminis, ut Justitia est servanda ; Deus est colendus ; temperate vivendum est : et similia, de quibus etiam nulla est dubitatio, et a fortiori patebit ex dicendis. In tertio ordine ponimus conclusiones quæ per evidentem illationem ex principiis naturalibus interentur, et non nisi per discursum cognosci possunt, inter quas, quædam facilius et a pluribus cognoscuntur, ut Adulterium, Furtum, et similia, prava esse. Alia majori indigent discursu, et non facile  
omnibus

any mischief we may have caused to others; to be always ready to render any innocent service that another may stand in need of; to keep our words inviolably; to avoid treachery; to honour our Parents; and obey our Sovereign, “so long as he does nothing contrary to the invariable maxims of natural right, or to the divine law as revealed to men. (g) All this, and much more, though they involve a number of points, many of which, as we shall presently shew, are neglected by some Nations upon principle; and others depend on things, which are absolutely *positive*; all this, it is contended, is enjoined by nature, with the force of law, “because it is written on the heart of man.

On the other side of the question, there have been many theories put forth, some of them eccentric to a degree of absurdity, others approaching nearer to a reasonable shape, but all of them adverse to this idea of moral obligation, confined to one particular system, “drawn from the mere nature of things.

Without going into the detail of these systems, and premising in the strongest terms our just horror, at those of them which say, that there is no obligation at all; or that it is the nature of man to be *vicious*; or that at least he has no law to follow but his own appetite; premising this, I say, I shall endeavour to examine the force of the foregoing argument, as far as it has been supposed to be conclusive as to the point of our discussion; which, it must be remembered, is simply whether, “without the aid of a visible divine interposition,” mere nature alone, can

omnibus notæ, ut fornicationem esse *intrinsece* malam; *Usuram* esse injustam; *Mendacium* nunquam posse honestari, et similia.

Again. Nam præcepta Decalogi sunt *de jure Naturæ*, ut est indubitatum apud omnes, et tamen non omnia continent principia per se nota, sed ubique indigent discursu, ut etiam est clarum. Id. Sec. 6.

(g) Barbeyr. Pref. to Puffend. P. 13.

point out the obligation upon ALL the world, INVARIABLY to observe the SAME moral duties.

Now it appears to me that the whole of the argument on which the affirmative of this opinion is founded, is liable to one great and invincible objection; namely, that it does not *sufficiently* establish the point, that the *mere social* nature of man carries along with it uniformly, universally, and of necessity, all that train of *social* duties, pursued through all their ramifications, which compose the moral system of particular classes of nations, and which have been attributed to *all* the world, with what justice, ought to have been more fully made out by facts.

That man is a social or gregarious animal, no one will deny. That he cannot be this, and at the same time seek *as the end of his being*, the destruction of those with whom he associates, is equally clear. But it does not follow, (at least not without some farther enquiry,) that because he is *social*, he is bound to pursue *one, definite, and certain set of actions*, as the systems of natural morality would always have us suppose.

It is of extreme consequence to settle this in the beginning, because the whole will depend upon it. If he really is thus bound; that is, if *all* mankind have always thought it writ down in their duty, to pursue the common GOOD in *one, particular manner*; then, every thing that has been said concerning the necessity of supporting the order and fitness of things to produce a *general* social happiness, will hold good.

But if he is *not* thus bound; if it should appear from FACT that the opinions of men concerning the manner of arriving at good, are so various, that although we may say which is the right one for ourselves, we cannot determine for others; then, what has been said concerning the dictate

of right reason, pointing out that a thing is morally right or morally wrong, from its agreement or disagreement with a reasonable social nature, can be applied only to those who concur in their sentiments concerning good, and cannot be made binding *a priori*, upon those who have sentiments of an opposite nature. We wish it, however, to be understood that in reasoning concerning moral agents, we do not mean to take into the account, any of those who *confessedly* give loose to their passions at the expence of reason; but only those who pursue the course of life, and the habits and maxims prescribed to them by their education, and their laws; of course, as far *as we are able to collect it*, who pursue their reason and judgment.

Now, if it should turn out that *all* such as these, do not uniformly and invariably act according to the same codes of duty; if many of them, (finding themselves independent of all *external* motives of religion, or positive conventions, and able, from mere strength, to shift for themselves,) appear to be indifferent about the fitness of things in the *sense which is put upon it*; or what is still more consequence, appear to have a fitness of things, as it were, peculiar to themselves, in some cases perhaps, the very *opposite* of the other; if this should be the case, I do not see how it can be said that the *nature* of man obliges the whole world to act uniformly and immutably in one, particular and definite manner.

This enquiry into facts; in other words into the history of Man, in order to come at his nature in these points, may appear unnecessary to those who take their ideas of universal morality, solely from their own. And indeed I have sometimes heard it asserted, that as the laws by which reason works are *immutably* the same; whatever is made out by



reason to be the law of nature, must be so *to every one*, without any enquiry at all.

If we take the matter up a little higher, we shall however find that this is erroneous—For although when our nature is once ascertained, reason may decide whether particular actions are enjoined by the law of nature or not ; yet it is not reason alone, but reason and fact together, which must determine what our nature is, or what it is not.

Of reason I have no other idea, than that it is the faculty of the mind which teaches us to draw conclusions from certain premises. What the premises are themselves, unless they again are to be deduced by reason from others, it never will teach.

Thus, although the heart and the feelings once thoroughly known, reason may point out the folly, or, in the language of the argument, the *disproportion* to nature, which is discoverable in the indulgence of blind passion at the expence of ultimate preservation ; and may that way, as has been ably shewn, decide upon what is nature and what is usurpation : Although it may point out the *utility* of gratitude, affection, and general benevolence ; yet it cannot plant those feelings in our bosoms. A man cannot force himself by reason, to be grateful, affectionate, or benevolent, if he happens to have the misfortune to be born without those feelings. Reason at least is so far from implanting them, that the Stoics, who place all happiness in wisdom, which is the perfection of reason, seemed to have for their object the absolute eradication of passion and affection.

Reason, therefore, as was observed, although it will point out to us what ought to be our conduct, (*our nature being fairly understood*, will not of itself tell us what that nature is ; and our knowledge in this respect must be derived solely from the  
senses,

senses, from observation, experience, and matter of fact.

When these have been consulted, we come at what we must always possess ourselves of, before reason can begin to work; namely, the *PREMISES*, the combination of which produces the conclusions drawn by reason; and if there should happen to be a difference about these *premises*, the conclusions, even of reason, cannot be immutably the same. When however, they have been ascertained; then, and not till then may reason step in and pronounce upon the conformity of any action to a general rule thus obtained.

And this is the sole meaning of our adding the epithet *reasonable* to nature; and of coupling, as we constantly do, the terms *laws of reason*, and *laws of nature*, in the same phrase.

This then being settled, we are sent to the History of the actions of man, to enquire what his nature is; and if we should discover that the tendency to pursue, *one, definite set of actions*, is not universal; or that the ideas of *GOOD* are not uniform; that is, if there should be strong, marked, and ample exceptions to these points; the argument concerning a particular system of morality for all mankind, enjoined by the Law of Nature, as far as it is drawn from the *universality* of its reception, must be given up.

That a law of *nature*, to be binding, must be shewn by the fact to be received by all mankind, may I think be made out, (should any doubt be entertained upon it) from the following considerations.

Whoever has observed the various senses in which the word *nature* is used; whether applied to the whole universe, or only to the world called earth; to the properties of all created substance, or only to particular distinct species of it, as living or inanimate, being; or subdivided again into parti-

cular parts of these, as vegetables, or stones; brutish, or reasonable animals; will nevertheless discover that it constantly means a *whole*, either absolutely, or relatively; that is, if a *Genus*, the *whole* of that *Genus*; if only a *Species*, the *whole* of that *Species*.

Thus, the term Nature, when put by itself, means invariably the *whole* order of things; the *το πᾶν* of the ancient philosophers. (*h*) When we talk of the *nature* of matter, we mean all matter; when we talk of the *nature* of animals, we mean all animals; when of the *nature* of human kind, we mean all human kind; and hence human nature is put for ALL men.

Even if we talk of the *nature* of particular divisions of men; such as the Africans, the Tartars, or the Italians; we should mean the nature of all the Africans, all the Tartars, all the Italians; so that if we were to say, that it was the nature of the Africans to be black; and *many* of them were to be white; or of the Tartars to have no towns but to love a wandering life; and *many* of them found established in cities; we should, I believe, be judged by all men, even the most circumscribed in their intellectual powers, to have given a very erroneous account of their *nature*.

NATURE therefore, in this acceptation of it, is what the Logicians call the ESSENCE of a thing; it is that, without which the thing described, would not be *what* it is described, of course, it must comprehend, and spread itself through every part of the thing. Thus, (to pursue our illustration) if an Indian who had never been out of the torrid Zone, (and

(*h*) . . . . . Airs, vernal airs,  
Breathing the smell of field and grove, attune  
The trembling leaves, while UNIVERSAL PAN,  
Knit with the Graces and the Hours in dance,  
Led on the eternal Spring.—*Par. Lost*, IV. 265.

who therefore believed, that it was a law of nature for rivers to be perpetually in a fluid state ;) were to visit a higher latitude, and to see the rivers gradually congealing by frost ; he would be obliged on his return home to tell his brother Indians, that they had been wrong in their ideas concerning the law of nature with respect to rivers.

Now to apply this (if the reader has not done it already) to the laws of nature as they concern human kind ; it will follow, that if these particular moral duties, such as they have been detailed above, are not received as moral duties, all over, or nearly all over the world ; no obligation can be made out from the heart, or the impulses of the nature of man, by which, independent of external motives, (i) we are all of us bound to observe them ; and as the Indian traveller was forced in visiting higher latitudes, to give up the idea of the law of nature concerning the invariability of the state of rivers ; so must a moral philosopher who argues for the obligation imposed by his system, from the universality of the feelings and dispositions on which the duties he enjoys are founded ; be forced to give up this obligation, should the fact of the universality, be fairly shaken.

In this respect therefore the rules of philosophizing with regard to morals, may be compared to the rules of philosophizing in physics ; by which it is laid down, that “the way of ANALYSIS, ought ever to precede the method of COMPOSITION ; which analysis, consists in making experiments and observations, and in drawing general conclusions from them by induction ; and although the arguing from experiments and observations by induction, be no demonstration of general conclusions ; yet it is the

(i) Namely, of Religion, or the Civil Power.



best way of arguing, *which the nature of things admits of*; and may be looked upon as so much the stronger, by how much the induction is more general. And if no exception occur from phenomenon, the conclusion may be pronounced generally. But if at any time afterwards, any exceptions shall occur from experiments; it may then be pronounced with such exceptions." (k)

Now I own, I do not see why this reasoning of the greatest of all experimental Philosophers, should not hold good with respect to morals. And should it do so, it will follow, that if upon an analysis of their modes of thinking, to be found in the history of mankind, there are any particular sets of actions which obtain *universally* and *uniformly* amongst them as duties; those duties may be fairly said to proceed from the NATURAL LAW. But if those sets of actions are found to be rejected by vast numbers of men; and not only this, but that their opposites are substituted to hold their places equally as duties; why then, the conclusion is to be pronounced not *generally*, but with such *exceptions*.

We might not hesitate even to affirm, that as what have been sometimes supposed to be the laws of nature as relative to physics, have been absolutely overturned by a long, uniform, and adverse set of experiments; so, were the fact to happen that men were found universally to pursue a conduct the very opposite to that which in *general* they think themselves obliged to adopt, the supposed natural law of mankind might also be said to be overturned; so much does the discovery of what this natural law is, depend upon experiment, that is upon what actually is the *general* conduct of men. Always however provided, that such an opposite conduct is adopted in compliance with the *deliberate judgment* of those

(k) Vide Sir Isaac Newton's Method of Philosophising. Optics, p. 10.

who pursue it and is not a mere *violation* in practice, of what is received and settled in theory.

As therefore before the introduction of experimental Philosophy, abundance of Hypotheses were often starting forth, which whatever ingenuity they might evince before the facts were enquired into, were instantly put down and confuted by adverse experiments; so it is very possible in morals, when men argue *a priori*, and assume things as fact, which may not be so, or not so in sufficient universality, for the whole fabric which they build, whatever may be its beauty or magnificence, to fall with its foundation.

Hence then it is we imagine, that the whole of this interesting subject resolves itself at last into the HISTORY OF MAN; to that, and that only can we refer, it is the sole point to which the forces of the two contending opinions can be satisfactorily directed; it is the only issue, that can be fairly joined, so as to produce a lasting conclusion. For in vain do we pursue the matter through all the subtleties of intellect; in vain are the profoundest metaphysics made use of to prove any one thing concerning the nature of man, *a priori*. Of that nature I can obtain no knowledge, except through the same channels by which I become acquainted with the nature of any other animal; nor can I tell what it is that nature demands of man to do, except by enquiring what he has actually done.

Now, if in making this enquiry, we were to find, that mankind were like a multitude that set forth to attain the summit of a difficult mountain; and many paths presenting themselves, that they all of them, or nearly all, took the same path; we might then with tolerable justice be led to believe, that they were *impelled* to it by some destiny, or law. But if, on the contrary, no external influence arising to deter them from all but one, the fact actually

ally proved to be that they often fell into different tracts; we should have no inducement to believe that only one of the various paths was the right one.

And no advice being given, no reward held out, no punishment threatened; in short being under no influence, other than the appearance which the paths might wear to bias their judgment; we could not reasonably imagine that it was a crime to enter into any one of them, more than another.

When however a track was once chosen, and that *upon a deliberate and firm belief that it was a right one*, even though in the end it should lead into mere labyrinths and quagmires, the set of travellers that pursued it would be bound to do so until they discovered their error; and thus, though there were as many different sets of travellers as there were paths, each set would be under equal obligation, *in their own minds*, to continue their course.

The history of the mind of man will probably upon examination appear to conform to this allegorical account of it. Some great principles may no doubt be found in such universal stability, that they may very fairly be said to form the Law of Man's Nature; as the desire of happiness; the pursuit of good; and the rejection of evil; and subordinate to these, the wish to support the interests of our country or families; for without these, the nature of things in these points, would indeed be destroyed. But when we come to the particular detail of the manner in which we can best arrive at these great objects, we must give up the expectation and even the hope of universality; for whether we take savage or civilized life, it will be found that the science of morals, which every one would have to be so certain, has been, *when divested of the visible and protecting hand of the Almighty*, capable of almost as much diversity of opinion, as there has been diversity of feeling and sentiment in different classes of men.

I mean

I mean not (as before observed) to draw any conclusions from the example of those men who confess an indulgence of passion at the expence of reason; but of those only who think they are acting rightly; of those even who have been remarkable for the subtlety of their understanding; many of them eminent for gravity, and some of them for superior virtue.

Thus CARNEADES, reasoning upon the obligations of morality, asserted that there was really no such thing as a law of nature; no such thing as JUSTICE; but that every thing that appeared useful, was thereby rendered lawful. GROTIUS could only ground the confutation of this, upon the disposition of man towards such a state of society as is supposed by the argument we are canvassing; *not*, says he, *qualiscunque, sed tranquillæ*; (1) which tranquil state, whether it is *universally* pitched upon to be the happy one, it is obvious can only be determined by an enquiry into the fact.

The celebrated HOBBS again, as is well known, questions this last opinion in the most direct manner, when he says the very nature of man leads him to war with his fellows. EPICURUS made all happiness to consist in pleasure, either mental or corporeal; without any great security for the rights of others which might stand in the way of it. ARISTIPPUS confined it to *sensual* pleasure; and the STORCS banished all pleasure whatsoever, by endeavouring to render the mind, what it certainly is not, an absolute blank with respect to the affections; and if pain could not be submitted to, their only resource was in self-murder. (m) The CYNICS, from princi-

(1) D. J. B. P. Prologom. 6.

(m) ZENO supported his own precepts upon this point in a manner somewhat extraordinary, when he hanged himself merely because he broke his finger.



ple, threw off all appearance of decency, and performed the most immodest and disgusting offices of nature, in public, upon the sole idea that it was nature that had enjoined them. The SCEPTICS and followers of ARCESILAUS doubted of every thing; refusing to decide that any one thing was strictly virtuous or vicious; doing away by such tenets, the whole advantage of Moral Philosophy. (*n*) PLATO, indeed contended for the dignity of human kind, and a refinement of friendship approaching to chimerical; but ARISTOTLE at least confined it to the handful of men called Greeks; when he laid it down that strangers were meant by nature to be their Slaves, and accordingly, that it was allowable to make them so wherever they could find them. The ROMANS, all wise as they were in the natural law, seemed to have had this Dogma in view, in allowing by their Digest, the reduction to captivity of all those between whom and themselves there was no treaty. (*o*)

They were equally faulty in maxims that regarded their private lives; of which their filthy and depraving custom of lending their wives to one another, (a habit which it should seem is as revolting to nature as any, and expressly forbidden by the writers on natural law,) is a sufficient proof. Nor did this exist when Rome was the receptacle of savage banditti; but when she was the abode of the Arts, of Statesmen, and of Orators. (*p*) A neighbouring nation who boast themselves still more wise than the Romans, seemed to go as far as they did in this point, when they passed the licentious law by which

(*n*) See Stanley's Hist. of Philosoph. tit. Diog. & Arces.

(*o*) Vide infr. Chap. VI.

(*p*) Cato lent his wife to Hortensius (she being then big with child) but a few years before the Augustan Age. The latter, as is well known, was an orator of the first rank, and a very accomplished man.

married persons might be divorced, without assigning any reason, but the mere persevering determination of either of the parties ; a kind of marriage which, I confess, I cannot distinguish from that of a Lion and Lioness in the woods, who copulate together and depart as they please.

The ÆGYPTIAN laws gave a sanction to Incest. By the ATHENIAN, a man might marry his Sister by the Father's side ; and if a woman was an heiress, she was bound to marry her next of kin—If also her husband was old and impotent, she was permitted to cohabit with his nearest relation ! and this was a law of the far famed SOLON. (*g*) In the same spirit with this, the Incas of *Peru* could only marry their sisters, if they had any ; if not, their nearest relation. (*r*) A Tartar, upon the death of his father, married all his Wives, except his Mother ; (*s*) and marriages with Sisters were permitted among them, and was sometimes even a duty, although fornication was punished with death. (*t*)

If this kind of incestuous marriage however is not unnatural, (which has been held by some ;) (*u*) others, which have been expressly condemned as such, (*w*) have also met the sanction of very extensive and even wise nations. ATTILA married his Daughter, in mere compliance with the SCYTHIAN customs ; and the MAGI of the Persians, following the laws of ZOROASTER, not only allowed the marriages of Parents and Children, but enjoined that the members of their own body could only be taken from the offspring of such a commerce.

And how is it that men have been known to treat their Children ; not in a burst of passion, *disproporti-*

(*g*) Potter's Antiq. 1. 170.

(*r*) Picart. Cerem Relig. 3. 204.

(*s*) Rubruquis Voy. ap Hackluyt. 1. 99.

(*t*) Carpinis Trav. ap Hackluyt. 1. 55.

(*u*) Grot. D. J. B. P. 2. 5. 12. 1.

(*w*) Id. 2. 5. 12. 2.

onate to a reasonable cool self love, but upon a *deliberate* principle of doing what they thought was good. The LACEDEMONIANS, in order to ensure a hardy race of men, destroyed all their infants that appeared infirm; nor were parents allowed to rear them, even if inclined to do it. The new born children were carried before certain Judges called Triers, who if they appeared likely to thrive, gave orders for their preservation; if not, they were thrown into a deep Cave of Mount Taygetus. (x) The same practice of exposing children was nearly universal over Greece, the Thebans being praised by Ælian for being the only people in the country, by whom the custom was prohibited. (y) By the Laws also of the Twelve Tables, the Romans were even commanded to destroy those of their offspring who were eminently deformed. "Pater, insignem ad deformitatem, puerum cito necato." (z)

Nearer to our own times is the still existing custom of the CHINESE; nor is it an excuse, but rather an aggravation to say, that *necessity* legitimates the practice; since the riches and the wisdom of CHINA are the boast of the world, and the necessity complained of must be owing, not to the *want* of food, but the improper distribution of it.

In the thirteenth century, BARTOLUS, the most famous Civilian of his time, and therefore the most likely to understand the law of nature, contended gravely that the Emperor of GERMANY was the Emperor of the World; and DANTE, another Civilian, assigned a reason for it, founded no doubt on the natural law, since he supposed it to be so, because it was for their good. Both antient and modern nations, and the wisest men amongst them, have concurred in justifying the Slavery, not merely of per-

(x) Potter Antiq. 2. 333.

(y) Ælian. 2. 7.

(z) Mem. des Inscriptions. 12. 78.

sons who may be supposed to have *forfeited* their liberty; but of those who have not even seen the light: For this they do when they assert, that as children must follow the lot of their mothers, the children of female *Slaves* must be *Slaves* also.

Lastly, the Legislators of twenty-five millions of men in FRANCE, affirmed, that it was *Nature* that had pointed out the true bounds of their Empire to be the SEA and the RHINE; and accordingly twenty-five millions of men wage bloody war, in part, to support this most natural proposition. All these absurdities, these horrors, and this injustice, are quoted, not as the *temporary* and avowed *rebellion* of the passions against reason; but as the dictates, to those who held them, of reason herself. Nor were they the maxims, or rule of conduct of *insane*, or *wicked individuals*; but most of them, as we see, are drawn from immense and important Empires; from the Schools of Sages, and the lives of Heroes. (a)

Thus much for the idea of *civilized* men and nations upon this subject. Were we now to go into the detail of the practices of others, who have never been in the habit of cultivating their reason, to any great height; we should contemplate that frightful picture of deformed humanity, which has induced many to believe that man is really meant by nature to be even a *vicious* being; than which nothing, as has been observed, is farther from our opinion.

The examination however of the accounts of savage life is demanded by our subject, because it has been sometimes supposed one of the most certain methods by which we may discover what our nature really is. Men, it is contended, are so much the Slaves of habit and prejudice, that it is very difficult

(a) Those who would go deep into this history of opinions may read the latter part of Barbeyrac's Pref. and consult Stanley's Hist. of Philos. and Bruck. Hist. Philosoph.



for them to reason upon things with that freedom, and as it were, *nakedness* of mind, which truth demands for its certain *developement*. And hence many philosophers, in their researches upon this subject, have preferred the lessons drawn from the opinions and customs of men, who approach nearest to the rude state of nature, to the more splendid, but less certain documents which are presented by a cultivated State of Society. Hence also arose the Theory of the State of Nature itself, which many have imagined, in order the better to set before us the deductions of their opinions.

If however, as we have contended, it is FACT which must determine all these points; we must pay no regard to the mere *theories* of what man *would* do in this state: but confine ourselves to what he is known to have done, in those circumstances in which he has *actually* been viewed.

But should we do this, the savage state is the most unfortunate of all others which writers could lay hold of in order to support their opinions concerning the *natural obligation* upon *all* men to pursue any particular system of morals; since it is notorious that there is no rule so sacred among mankind, (if by mankind we mean *civilized* people,) no duty so venerable, no conduct so beautiful, as not to be rejected almost invariably by Savage Nations, and their very opposite substituted in their places.

It was held by SUAREZ, (*b*) that all the crimes of the Decalogue, are crimes against the law of nature. There is hardly one of them, that is not practised, and that almost invariably, by those who approach nearest to what is called a state of nature. They have a variety of Gods, and set up graven images; of the holiness of the seventh day, they can have no idea; if they honour their fathers and mothers, they do it

(*b*) Ut Sup. p. 32.

at least in a way which fills civilized people with horror: since they knock them on the head, or feed upon their bodies and entrails, (than which it would appear nothing can be more revolting to nature.) (c) Their murders, their thefts, their adulteries, (attended sometimes with circumstances of horror,) (d) and

(c) The *Tartars*, says Hackluyt, have a strange, or rather miserable kind of custom, "for when any man's father deceaseth, he assembleth all his kindred, and they eat him." (*Voyages* 1. 59.) The people of *Tout* used to eat the carcases of their parents, not from want, but that for pity's sake, they might make no other sepulchre for them than their own bowels; (*Id.* 1. 116.) and even so late as 1253. they continued to make drinking cups of their skulls. (*Ib.*) The *Africans* are said to have fed constantly on the dead bodies of their friends; (*Lapeer ap. Piccart.* 4. 47.) and the *Floridans*, the *Mexicans*, and the *Caribs* ground the bones of their relations to powder, and drank them. (*Id.* 3. 133. 141. 166.) The *Islanders of Satala*, when their friends are dying, do not wait their last moments, but bury them alive. (*Id.* 4. 503.) To this head may also be referred the noted custom of the *Indian* widows, of burning themselves on their husbands' bodies, and of many people on the same account, among whom, when a husband or wife dies, it is a point of honour for the survivor to be buried with the corpse. The inhabitants of *Java* were not content to destroy their old men, or such as could not work, but carried them regularly to a public market, and sold them to the *Anthropophagi*. (*Id.* 4. 136.)

(d) Among the *Banians*, an extensive sect that spread themselves through all the provinces of India, (*Broughton's Hist. of Relig. Voc. Ban.*) the Husband possessed his Wife only the first night, and afterwards all his Brothers alternately to the seventh, if there were so many, during the seven nights after; and the husband could not claim his wife exclusively from his brothers, but she and her issue were common to them all. (*Piccart. Cerem. Rel.* 4. 149.) The *Moguls* kept their Women in common, both Mothers and Daughters upon principle. (*Id.* 4. 364.) And the like custom is recorded by *Cæsar* to have had place among our ancestors in Britain. "*Uxores habent deni duodenique inter se communes, & maxime fratres cum fororibus, et parentes cum liberis;*" &c. (*De Bell. Gall.* 1. 5.) So also the *Otahietans*, among whom, in addition to the almost universal licentiousness of the women, there existed a horrid Society or Club, in which all the women were not only common to all the men, but the children were destroyed as soon as born. (*Cook's Voyages.*)

their covetousness of other mens goods, are too universally known to need much amplification.

It is held that the law of nature obliges men to respect each others property. The time was, and is, when amongst vast nations of men, to plunder, not from one another, but from all the rest of the World, was considered as the highest duty, and success that way, the highest praise. (e)

It is held, that parents are to protect and cherish their children. Numerous are the instances, where children are exposed, or sold to slavery, or wantonly put to death, and even *eaten* by their parents, without that *necessity*, which alone can bear the semblance of a reason for it. (f)

It

(e) Many nations are known to subsist by the pillage of Travellers who pass through them to other countries, as the Arabs, and many of the Tartars; The Malays are nearly all pirates; and so formerly (nor were they ashamed of it) were several nations of antiquity; Thucydides observing that among the ancient Greeks to be asked whether a people were pirates, was not to reproach them. The Solitary Indian who was met by Captain Cook in Dusky Bay in New Zealand, being presented with hatchets, and asked what he would do with them, said he would go and kill men. (Foster's Voyage.) The king of *Benin*, in Africa, upon ascending the throne, massacres numbers of his subjects in honour of his accession. (Picart. 4. 450.) The *Guages*, a people of the same country, when they go to war, elect and consecrate a General, who at a sacrifice is presented with a hatchet, with which, as a proof of the prowess to be expected from him, he is to cut down a youth that is brought to him at a blow. (Id. 4. 472.) The Scandinavians waged universal war: but we shall have occasion to observe these points more particularly in the history of the Law of Nations.

(f) Among the Mexicans, if a Mother died while suckling, and in Madagascar if in child-bed, the child was put to death, in order to prevent its being an orphan. (Picart. 3. 176. 4. 510.) In Bengal, formerly, if a new born child refused the breast, it was exposed a whole day upon a tree in the woods, to the mercy of the Crows and Insects, and taken down in the Evening. If it still refused, it was exposed a second day, and if it refused a third time, it was thrown into the *Ganges*. (Tavernier's Trav. l. 3.) The *Korassites* destroyed their daughters, thinking many of them a nuisance;

It is said, that USURY is forbidden by this law. Yet nearly the whole World, concur in the practice of demanding interest for money, and the virtuous BRUTUS himself, so celebrated *for giving every man his own*, was one of the most noted Usurers of his time.

It is held, that nations should do as little harm as possible to one another in war, consistent with their mutual interests. Yet who shall reconcile this with the horrid custom so prevalent among Savages, of eating prisoners out of revenge; nay of refining their taste on this point, and taking pains in the preparation, in order to render the repast more exquisite? (g)

a nuisance; and when the mothers were in labour, they were carried down to a grave side, where if the child was a female, she was instantly buried alive. (Picart. 6. 111. confirmed by Pococke.) The inhabitants of *Caucasus*, made a trade of their children, and take many wives for the express purpose of *producing for the market, in the same manner as if they were cattle*. (Chardin's Trav. ap Harris. 1. 865.) The Amazons are said to have mutilated their male infants as soon as born, in order to prevent their being formidable to them. And to this head may be fairly referred the shocking custom so familiar with our own days, of emasculating children for the purposes of Jealousy in the *East*, and of amusement in *Italy*; which latter is still more unnatural, since the preservation of a wife's chastity is of more consequence, than the gratification of a mere passion for music.

(g) The ancient Cannibals of *Ireland* are said to have considered the posteriors of boys, and the breasts of women as the daintiest dish. (Speed. 167.) The Brazilians would not eat their prisoners till they were fat, and of a certain age; and if any one, destined to the slaughter house, was lean, he was carefully fattened. During the interval, (probably with a view to bring him sooner into good plight) he was allowed every sort of amusement, and even a woman for his companion; who so far put on the appearance of a wife, that when he was actually butchered, she howled and wept as if she had lost her best friend; but when he was cut up, she partook of the feast with her countrymen. (Picart. 3. 183.) The Antis, a people of South America, cut their prisoners piecemeal *while alive*; and the women, smearing their nipples with the blood, gave them their children to suck. (Id. 3. 199.)



It is asserted, that the law of nature obliges us to obey our Sovereign, so long as he does nothing contrary to natural right.—What that natural right exactly is, has puzzled, or at least divided, all the sages who have investigated it—Thus, when the FRENCH wished to overthrow their old constitution, the foundation for their power to do so, was sought for in an account which they drew up, of the rights of man. When they overthrew their new constitution, they found they had been wrong in this account; and they therefore employed another set of Sages, to draw up a second; not to mention the spreading and most pernicious opinion, that because the people are, (what no one can contradict,) the fountain of all power, the people may therefore destroy the government which they themselves erect, as often as they please, and merely because they please.

It is asserted by one set of writers, that we are bound in ALL cases whatsoever, to speak the truth. By another, it is however permitted to deceive, when a man asks for information for a bad purpose; as in the case of a mad or passionate man, who asks you where his enemy is, in order to destroy him.

And thus, concerning all, or almost all these duties, which it is supposed are enjoined with so much certainty and plainness by the law of nature, there is a wide difference in the opinions, and a still greater difference in the *deliberate* practices of mankind; from the *uniformity* of which practices alone, they can be said to be *universally* binding.

What then are we now to think of those momentous propositions of the profound BUTLER and others, which could they be made out with *universality* and *truth*, would most undoubtedly decide the whole question?—I mean that the *perception* or *principle* of CONSCIENCE, is sufficient to point out to a man, the moral good or evil which attends every part of his conduct; that obligations to the practice of virtue,

tue, drawn from a review of our nature, are really no more "than appeals to every man's heart, or natural conscience, in the same manner as the external senses are appealed to for the proof of things cognizable by them;" And that if any plain honest man, before he engages in any action, were to ask himself whether what he is about to do, is right or wrong, "he would be able to answer the question agreeable to virtue and truth in almost any circumstance."

That there is such a perception as CONSCIENCE, and such a feeling as SHAME, cannot be denied; but may we not from what has just been related, affirm with some degree of reason, that they are *mutable*, and vary with the varying ideas of man concerning what is duty; that they are made to depend upon the *prejudices* of his education, or at least cannot be distinguished from them, and therefore that they are the mere compunction which he feels for having done something which shocks those prejudices? of course, that they cannot go the length of forcing ALL mankind to the observance of *one particular set of morals*, which, it cannot be too often remembered, is the sole question? (*h*)

In this point of view therefore, the question concerning Conscience and Shame, (as they are supposed to enjoin a particular scheme of duty,) resolves itself into, and indeed becomes, that other celebrated question of the Moral Sense, or the "Innate knowledge of right and wrong; concerning the existence

(*h*) They who contenting themselves with superficial and transient views, deduce the difference between good and evil from the *common sense* of mankind, and *certain principles that are born with us*, put the matter upon a very infirm foot. For it is much to be suspected that there are no such *innate* maxims as they pretend, but that the impressions of education are mistaken for them; and beside that the sentiments of mankind are *not* so uniform and constant, as that we may safely trust such an important distinction upon them.—Wollaston. Relig. of Nat. p. 23, 6th Edit.

of which, it is known that men of the first Abilities and Judgment have doubted.

Into this celebrated enquiry, it is not my intention to enter, since it would be but a vain expence of time when so many persons of learning competent to settle it, (if it could be settled,) have failed in drawing any absolute conclusion upon it.

It will perhaps however be at least safe to conclude with an author of deserved reputation for knowledge in the science of morals,—“ Either that there exist  
“ no such instincts as compose what is called the *Moral Sense*, or that they are not now to be distinguished from *prejudices* and *habits*; on which account, they cannot be depended upon in moral reasoning.” (i) Should this conclusion be nearest the truth, the upholders of the natural law, “ as far as it concerns one certain set of actions for the whole world,” must lose the support which they wish to derive from this principle; which indeed, could it be satisfactorily made out, would preclude the necessity of every sort of enquiry upon the subject

Upon the whole then, if we consider mankind as totally independent of the controul of civil institutions, and destitute of those inestimable advantages concerning the intentions and providence of the DEITY, which his goodness has *revealed* to us; it would appear that the law of nature, as far as the particular ramifications of morality are concerned, is like the moral sense itself. That is, either it does not exist at all, or it is so confounded with our prejudices, and habits, and peculiar ideas of happiness; and so variously made up, according to the various casts of thought, and the varying perceptions of man, that with respect to the obligation in the *Universe* to pursue the *particular* duties which it is said to enjoin,

(i) Paley's Mor. Phil. B. 1. ch. 5.

nothing *certain* can be *satisfactorily* laid down concerning it.

It is in vain that we are referred to Reason, as capable, from its *immutability*, of giving us one certain and never failing rule, by which we may arrive at the binding principle. We have already observed, that although the laws by which reason works are *immutable*, yet unless the *premises* are settled, nothing can be made out by them; and if the foregoing account of the actions of man when left to himself, is thought sufficient to prove him a being whose nature cannot be discovered, with any great degree of certainty, to impel him invariably to the observance of *one certain System*; it will follow that the laws of reason themselves will not enable us to make out the point, any more than CONSCIENCE, or the mere consultation of our hearts and feelings; the great proof of which is to be discovered, in that multiplicity of discordant theories, (all of them equally attempted to be made out by reason) which has already been laid before the reader. (*k*)

And this may also serve as an answer to very many triumphant assertions that have been made concerning the power of reason; which can only be ascribed to the mistake of those who make them, in not seeing that even for REASON to discover any truth, it is necessary that the truth of the *premises* should be already allowed.

Hence therefore, when BURLEMAQUI affirms as he does, (*l*) that many reasonings and customs which

(*k*) Puffend. 2. 3. 20. has the following passage, *La Raïson n'est pas à proprement parler, la Loi Naturelle, mais seulement un moïen de la connoître, si nous le mettons en usage, comme il faut.* Now who is to answer for what is *comme il faut*? Montaigne goes into the other extreme, (*Essais*. l. 2. ch. 12.) And Wollaston confesses that in this talk concerning *right reason*, room is left for many disputes and *opposite right reasons*, and nothing can be settled while every one pretends that *his* reason is right.—*Relig. of Nat.* p. 23.

(*l*) Burlemaqu. Du. D. Nat. 2. 6. 8.



appear adverse to *his own system*, are mere deviations from the right rule; he does not consider that those very reasonings and customs must be consulted, in order to ascertain what the right rule is.

BARBEYRAC falls into the same mistake, though he assumes a more regular appearance of argument, when he says that particular tribes of men may be compared to the servants of a master going a journey, who leaves certain orders with those servants, easy to be understood and to be executed, but which they do not obey. In which case, says he, they may afterwards fall into great disorders from the want of consulting them, and although they may have every good wish to do what is right, still they are not less liable to be blamed, nor less worthy of punishment upon his return. (*m*) In this illustration the point in question is assumed. Since the difficulty is to discover what the orders of our master may mean, even *after* having consulted them; and the very circumstance of our confusion proves that they may be misunderstood. It is equally assumed by him in another place, where he says that men of understanding have *abused* their leisure and talents, in broaching doubtful points. (*n*)

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Hitherto we have viewed the nature of man apart from all considerations of religion whatsoever; not merely from those *revelations* which God in his bounty has bestowed upon the world; but those *general* sentiments of a deity, which compose what is commonly called *natural* religion.

And we had good reason to do this; since two of the weightiest writers upon our subject have supposed, that all the duties, the obligation of which we are examining, are commanded by the law of nature, and are therefore binding upon ALL men, “ even

(*m*) Barbeyr. Pref. to Puffend. p. 14.

(*n*) Barbeyr. Pref. to Puffend. p. 17.

though they should be impious enough to deny the very existence of a deity." (o)

Graver considerations however present themselves now for discussion. The difficulty, not to say impossibility, of deriving any particular system of morals, (obligatory upon ALL) from *natural feelings* alone, or the dictates of reason occupied merely in analysing those feelings; has induced the greater number of writers to wave the point of a *total* want of religion, and to admit that the idea of a Deity must enter into the composition of the law of nature, in order to render it binding. Thus it is confessed, that however clear the dictates of reason may appear, there is no obligation upon man to comply with them, without having recourse to something higher. (p)

An important and very reasonable theory is therefore set out, (the effect sometimes of most profound deductions,) by which it is held, that the obligation in question arises from GOD himself; who in quality of Creator and Conductor of human nature, *prescribes* to man with *authority*, the observance of the law. (q) Being the author, it is said, of nature and reason, whatever is commanded or forbidden by *him*; not that he is supposed *ab initio* to have revealed himself sensibly to the world, or to have pronounced

(o) Vide ut sup. Vattel Prelim. Sec. 7. & Grotius, D. J. B. P. Prolegom. 11.

(p) Cependant pour donner force de loi aux maximes de la raison que nous avons établies, il faut, comme je l'ai dit, supposer ici un principe *plus relevé*. En effet, quoique leur utilité soit de la dernière évidence, cette considération seul, ne sert pas assez forte pour convaincre l'homme qu'il est dans une nécessité indispensable de les partager, toutes les fois qu'il voudroit renoncer aux avantages qui reviennent de leur observation, ou qu'il croiroit avoir en main, des moyens plus propres à avancer ses intérêts. (Vide Barbeyrac's Puffend l. 2. ch. 3. Sec. 20.) Again, Sans la Divinité, on ne voit rien qui impose un besoin indispensable d'agir, ou de ne pas agir d'une certaine manière. Pref. 23.

(q) Il faut donc nécessairement poser pour principe, que l'obligation de la loi naturelle vient de Dieu même, &c. Id. Ib.

certain

certain things to be good and others to be bad, and to have commanded the one and forbidden the other, in the declared quality of LEGISLATOR; but merely, and by inference, as the author and governor of nature. (r) All this is made manifest, they affirm, by reason alone; and not only this, but the end he proposed to himself in the creation of the world is demonstrated, *through the same medium*, to be his own GLORY, as well as the happiness of men; which glory they go on to say, consists in manifesting his perfections, his power, his goodness, his wisdom and his justice. (s) Thus there is no occasion for a particular REVELATION to enforce the law; since it is indifferent whether God clothes himself in a human form, and pronounces it with his own mouth; or makes use of the intervention of some inspired person; “or merely contents himself with discovering his will in the simple precepts of right reason.”

(r) Grotius (D. J. B. P. 1. 1. 10. 1.) makes Natural law to flow from God as the *Auctor* Naturæ; and this sentiment was broached long before him by SUAREZ in the following passages: Ergo sine dubio, Deus *Effector*, et quasi *Doctor* legis naturalis. Non tamen inde sequitur, ut sit Legislator quia Lex Naturæ, non indicat Deum ut præcipientem; sed indicat quid in se bonum et malum, sicut visio talis objecti, indicat illud esse album aut nigrum. Et ut effectus Dei, indicat Deum ut Auctorem, non tamen ut Legislatorem; ergo consendum erit de lege naturali.—De Leg. ac Deo Legislat. 1. 2. c. 6. Sec. 2.

Again. Legem naturalem omnino positam esse in divino imperio, vel prohibitione, procedente a voluntate dei, ut Autore et Governatore, &c. Id. Sec. 4.

See also the whole of Cap. 6. 1. 2. of Suarez, where he considers the question An lex naturalis, sit vere lex divina præceptiva?

(s) La fin que Dieu s'est proposée par rapport à ses Créatures, et en particulier par rapport à l'homme, ne peut être, d'un côté que sa Gloire, et de l'autre, que la perfection et le bonheur de ses créatures, autant que leur Nature ou leur Constitution les en rend capables. Ces deux vues si dignes du Créateur, se combinent, et se réunissent parfaitement. Car la Gloire de Dieu consiste à manifester ses perfections, Sa Puissance, Sa Bonté, Sa Sagesse et Sa Justice.—Burlem. Du D. Nat. 2. 2. 3.

(*t*) Nay farther, although all the world should not be able to make out these precepts, still, it is held, that all the world are not the less bound to observe them. (*u*)

To this reasoning however, (if it is meant to go the length of obliging *all* mankind to the observance of one particular set of moral actions,) the same arguments are applicable, as were applied to the theory of an uniformity of perceptions and feelings.—For if the *fact* actually is, that mankind do *not* agree in all these particular deductions respecting natural religion, it cannot be expected that the obligation derived from that religion to obey one particular moral system, is to be *universal*:—And I am free to own, that what is asserted, is above my comprehension, that although these deductions are not to be made out by every one, still, that every one is bound to act as if they were. For it is thus supposed in the same breath, that religion is only to be made out by reason; and yet that if it is not so made out, it shall still exist in all its authority.

That there is such a thing as religion, distinct from REVELATION, few indeed can venture to disbelieve. That *all*, or nearly *all* persons have thought *alike* of it, is too plainly against experience to need much proof.—Yet it should be demonstrated that all, or nearly all, have had the *same* ideas of it, before any use can be made of it to shew that the obligation upon *all* to observe one *particular* and *certain* set of duties, can be derived from it.

(*t*) Puffend. l. 2. C. 3. Sec. 20.

(*u*) Mais que qu'une Loi pour avoir force d'obliger, doive nécessairement être notifiée à ceux qui dépendent du Législateur; & que tout le monde de soit pas capable de découvrir le véritable fondement des loix naturelles, et la liaison nécessaire qu'elles ont avec la nature humaine, ni de les deduire methodiquement des principes de la raison: *Elles ne laissent pas pour cela d'obliger tous les hommes*; &c. Puffend. Ib.

Now



Now it is of no consequence to be able to demonstrate *to ourselves*, the absurdities of all religious notions opposite to our own. That demonstration will have the effect of producing obligation upon *us*; but can never impose an obligation upon others who do not, or can not see the force of it; and should others, setting out from different premises, arrive at different or opposite conclusions; there will be an equal obligation upon *them*, to the performance of things directly opposite to what we conceive it a duty to practice *on selves*. In vain therefore is it said, or demonstrated ever so plainly, to their own satisfactions by particular men, that there can be but one notion of a Deity, if such a proposition of their being *several* notions of it, to the *whole* of mankind; since (according to our old observation) it is *fact* alone which must determine that point. Speaking accurately, we may fairly say that among CHRISTIANS, or persons who see elementary things in the same point of view, there must be a conformity; but whether that conformity must be *universal*, among all mankind, whether Christians or not, we can only determine by analysis, (if I may so say) that is, simply by examining the fact, whether Men *universally* see elementary things in the same point of view. (w)

Those who have made this examination, are not to be told the immense diversity of sentiment to be found upon this most interesting subject: and whether we take the uniform difference between savage and civilized life; or the difference between the notions of civilized men themselves: we shall find there is nothing so distant from conformity, as the opinions which we shall there be able to discover.

(w) It is the same argument with that which holds the necessity for an uniformity of premises, in order for Reason to work in one and the same manner.

The naked and solitary Indian, who had beheld and revered the course of the Sun and Moon; had trembled at the lightning, and listened fearfully to the storm; though he might be convinced there was some Power in the universe far superior to his own, could hardly arrive at those conclusions concerning the *intentions*, the *bounty* and the *justice* of providence, which are supposed by the argument to flow from nature alone; for less would he, or does he imagine, that he is bound to observe those actions which *civilized* men call moral, by the absolute commands of a Deity, of whom he is known to have had such grotesque, and often such horrid ideas.

Now according to the whole tenor of the foregoing arguments, we say it is fair to suppose that *UNCIVILIZED*, as well as *CIVILIZED* nations believe the religious notions which inspire them, to be the dictates of their nature; and although *CIVILIZED* reason should demonstrate, ever so much to its *own* satisfaction, that *UNCIVILIZED* minds are wrong in their ideas; yet unless the latter agree that they are wrong, nothing satisfactory can be determined.

The atrocities and disgusting practices that every where take place under the notion of religion, among nations that are held to be *UNCIVILIZED*, are too notorious to need much descant.

It is sufficient to observe, that if religion *distinct from Revelation*, is supposed to enforce the duties of brotherly love; of universal philanthropy; the preservation of our lives; and the general peace, and good order of mankind; it is well known that the religion of men in certain situations, has almost uniformly produced the very reverse of all these. The necessity of dying violent deaths in battle; (x)

(x) The religious duty of all the Scandinavian Ancestors, whose paradise could only be obtained by such means. Vide *instr.* chap. vii.

or upon the tombs of relatives or masters; ( $\gamma$ ) the immolation of captives and strangers to Gods known, and unknown; the slaughter of fellow-creatures to the means of friends; the offering of our very children, and that in a manner the most horrid and barbarous ( $z$ ); the most shameless violations of decency;

( $\gamma$ ) The custom of the Indian Widows already taken notice of: Of the Inhabitants of Agag, in Africa, the wives of whose king are all forced to poison themselves upon his death. (Picart. Cerem. Relig. 4. 495.) of the Floridans who buried Slaves with their Masters. Id. 3. 133. and of great variety of others, particularly the African Nations, as is well known.

( $z$ ) The Macaraguans, the Mexicans, the Peruvians and Formosans, sacrificed all their prisoners of war. (Picart. 3. 147. 168. 4. 173.) At Campeachy the Spaniards, when they visited it, found Idols of horrid shapes, and near them several dead bodies newly sacrificed. (Conq. of Mex.) The antient Marcellois used even to pamper their victims for a whole year, in order to fatten them before they sacrificed them. (Pic. 3. 148.) The Inhabitants of Tanchuth had a Goddess whom they called Manipa, who had nine heads, and to whose honour, on certain days of the year, a stout young man used to sally forth into the streets and kill every one he met, and their bleeding bodies were immediately borne an offering to this terrible deity. Aristomenes, the Messenian, sacrificed three hundred Spartans together, with their king Theopompus, to Jupiter of Ithome. The bloody sacrifice made by Achilles to the manes of Patroclus, must be well remembered: Even the wife Themistocles offered sacrifice of Persian Captives to obtain success against that nation. The Carthaginians it is well known used to offer their Children to Saturn, by placing them on the hands of the Idol, which by being inclined downwards let them roll into a burning furnace below. Bacchus had an altar in Arcadia, upon which young Damsels were beaten to death. The Mexicans adored an Idol made of all the seeds of the earth, kneaded with the blood of young children, whose hearts were torn out of their bodies and offered as an acceptable gift to the Idol thus made. (Pic. 3. 147.) They had also a Goddess called *Toxi*, whose absurd history is, that she was deified by their great God *Vitzliputzli*, who made them first demand her of her father as Queen; she was then put to death, and slayed, and a young man covered with her skin, and thus being translated from Earth to Heaven, demanded the cruellest sacrifices; namely, human Creatures. (Conq. of Mex.) When the corn began to  
spring



ty; (a) are the characteristic barbarities of the Pagan religions.

It is said however, that these are either degeneracies and corruptions of our reason; or the notions of men who have never improved their faculties by the advantage of civilization, which if they had possessed, it is affirmed they would have thought as we do: (b)

spring among these people, they sacrificed a boy and a girl to *Tlalock*, the God of the Waters. When it was two feet high, four children; when they entered the great lake on a festival, a boy and a girl were drowned in honour of it; (Pic. 3. 154.) and when they went to war, five boys and as many girls, three years old, were offered to their God *Quitزالcoalt*. (Brought. voc. *Quitزالcoalt*.) In these cruel sacrifices of children, they were imitated by their neighbours the *Peruvians*. (Pic. 3. 188.) and the same custom was pursued by the *Formosans*, who believed that the souls of the wicked passed into Dæmons, whom they were bound to implore with sacrifice and supplication, the former of which consisted often of Infants. (Descrip. of Formos. ch. v. 17.) The *Ostiacs*, a set of Tartars, worshipped what they called the old Man of Oby, to whom when they went a fishing they offered prayers for success: but if they failed, they stripped him naked, whipped him, and threw him into the dirt as an old, impotent, despicable God. (Brought. voc. *Oby*.)

(a) The Priestesses of Formosa, after devout prayer, used to strip themselves naked on the top of the Pagoda, and put on the most lascivious gestures, in order the better to allure their Gods to hear them. (Pic. 4. 270. Brought. Hist. of Relig. voc. *Juibas*.) The *Houames*, a religious sect of the Arabians, after prayers in their tents at night, used to cohabit in the dark with the first person they met, whether father, mother, brother or sister. (Ricaud. Hist. of Ott. Emp. and Thevenot's Travels.) The *Moabites* and *Midionites*, people far from a state of Savagism, were reproached with worshipping the famous Idol *Baal-Phegor* (to whom even Solomon erected an Altar,) in a manner so disgusting "eo quod distendebant coram eo foramen" podicis, & "stercus offerebant." (Broughton. voc. *Baal. Pheg*.)

(b) Dira-t-on que ce fussent la des loix du Droit des Gens, qui obligassent véritablement les Nations? Il faut plutôt les regarder comme des pratiques, barbares, dont toute Nation juste et bien policée doit s'abstenir. (Burlemaq. Du D. Nat. 2. 6. 8.)

For



For a moment let it be so, and the point we labour at is therefore accomplished. For when we talk of the world we shall then only mean the *civilized* world; and not only that, but the world civilized after our own ideas; since many of the examples quoted, are taken from nations comparatively advanced in improvement. Thus, a difference is made between two parts of mankind; and what we held is found to be true, that it was an inaccuracy to say the laws in question "as far as they related to a particular system," were binding upon ALL.

But I fear we cannot stop here, since even if we confine ourselves to what we call *CIVILIZED* life; we shall find as much diversity in the opinions of men who have dedicated their lives to the cultivation of their reason and the study of mankind by travel and meditation, as between the notions of savagism and refinement.

The learned reader is not to be told the various absurdities, the imaginary visions, and the sometimes impious opinions, that have been sent abroad under the form of Theories of Religion, by all those who have lived, or live without the benefit of REVELATION.

One set of the antient Philosophers, believed the world to have been formed by the Gods after much labour. Another by the fortuitous concurrence of atoms. The one trusted in a certain providence, that was always at work for the protection of the wise: The other, that the Gods, if there were any, gave themselves no trouble about mankind, but busied themselves solely with their own pleasures. A third set, upheld the doctrine of necessity and predestination, which renders all care about our actions useless. A fourth conceived the transmigration of souls; and almost all concurred in a plurality of deities, the licentiousness of whose manners, and whose violent and human passions, must have  
generated

generated ideas of them, which it is not more absurd to imagine of an all wise and just Deity, than they would be incapable of producing any good effect upon morals.

Whole tribes have been known, as well civilized as uncivilized, to have no idea of God or Religion at all ; as the Inhabitants of Soldania in Brazil ; of Boranda, and the Caribbee Islands, and the great Sect calling themselves by way of distinction the *Learned* among the Chinese ; a circumstance much dwelt upon by Mr. Locke, to prove the non-existence of Innate ideas. (c) In the Empire of Japan there is a religion called the Sinto Religion, the followers of which place their whole happiness in present and sensual enjoyments, (d) The Turlupins, an infamous Sect of the fourteenth century in France, seemed to imitate the conduct of the antient Cynics, in holding that they ought not to be ashamed of publicity in the performance of what was enjoined by nature : they also taught that they were arrived at a state of perfection, and were freed from all subjection to divine law. (e)

One proportion of mankind believe in a principle of good, another in a principle of evil. (f)

The first imagine every thing is for the best ; the last that we are born to be miserable. The Egyptians (a cultivated people) worshipped almost as

(c) Eff. on Hum. Und. B. 1. ch 4. Sec. 8. It is right however to mention that modern discoveries affirm the *Literati* of China to be Theists.

(d) Broughton. voc. Sintoists.

(e) See Mezerai. ch. 5.

(f) The doctrine taught by the Manichæans ; (Bayle voc. Manes)—and the Magi of the Persians ; the latter of whom characterized the two principles under their famous Gods Oromasdes and Arimanius. (Broughton. Hist. of Relig. voc. Magi.) Oromasdes was supposed to have created the other, merely because, having no one to oppose him, he could acquire no glory. (Id. voc. Arim.)

many Gods as there were Animals. Many other nations of Africa pay Divine Adorations to Serpents ; many of them to the Devil. The Persians worshipped Fire, the Egyptians Water. (g)

In *Formosa* it is thought contrary to religion, and the law of nature, for women to bear children before six and thirty. Yet they are absurdly allowed to marry, and if they prove pregnant they apply to a priestess who violently brings away the foetus. (b) The *Armenians* worshipped a Goddess called *Anaitis*, to whom the daughters of the greatest men of the Country were dedicated, who as the greatest honour they could pay to her, prostituted themselves to all those who came to offer sacrifice ; after which they were eagerly courted in marriage as having acquired extraordinary sanctity. (i) The *Mozdarians*, a Sect of the Mahometans, held the impious doctrine that God could even be a liar and unjust ; (k) And the Christians themselves, whenever they have departed from the plain precepts of the Gospel, have degenerated into doctrines equally absurd, and fatal to morality. Thus, the *Priscillianists* in the fourth century, held the principle of Evil with the *Manichæans*, and that it was lawful to take false oaths in

(g) The God of their Waters was *Canopus*, concerning whom a ridiculous legend is extant. The Chaldæans upholding the superiority of their God Fire above all other Gods, the proof of which they deduced from uniform power of fire to destroy every thing thrown into it ; an Egyptian Priest made an Idol of Canopus with a large earthen belly pierced full of holes, which were stopped with wax, and the Image filled with water. A contest with the God of the Chaldeans was demanded the Image : was thrown into the fire, which as it melted the wax, let out the water and was extinguished, to the great triumph of Canopus, whose fame was instantly bruited through all the adjacent countries. (Soidas voc. καπερον—& Picart, 3. 231.

(h) Picart. 4. 276. 7.

(i) Brought. Hist. of Relig. voc. Anaitis.

(k) Id. voc. Mozdar.

support

support of our interests. (l) The *Ophites*, in the second century, imagined Christ to have been the Serpent that tempted Eve, and therefore paid adorations to a Serpent in administering the sacrament, as well as to Seven Dæmons whom they were reproached with worshipping. (m) The *Gnostics* (the very etymology of whose name signifies *enlightened*;) denied the world to come; held the two principles of good and evil, and a difference between God and the Creator of the world. (n) The *Simonians*, the followers of Magus, denied the resurrection of the body, and with the *Gnostics* and Nicolaitans allowed the promiscuous use of women.

Lastly, within our own view, the Legislators of millions in a neighbouring nation, when they resolved to carry the dictates of reason with respect to religion (according to *their* ideas of them as far as they would go; ended in abolishing all notions of a future life, or of a divine moral Agent. They did the first, by voting that Death was an eternal sleep; by which they renounced the immortality of the soul: They did the last, by voting that nature alone should be the object of their worship, by which they renounced their allegiance to any sort of Deity at all.

And thus, under the notion of religion taught by nature and reason, (and even after we have received the light of the Gospel, if we degenerate from it,) there is nothing so absurd, so uncouth, or so wicked, as not to find support some where in the world, either in the civilized or uncivilized part of it. And hence my Lord *Shaftsbury*, at the same time that he contends very strenuously for natural virtue

(l) Priscillian was ordained a bishop (of Avila) and became formidable. (Baron. Ann. 381.)

(m) Brought. voc. Oph.

(n) Id. voc. Gnost.



as forming part of our System, is obliged to own that a *false* religion wherein the character of the Deity is evil, will make EVIL to be considered as GOOD. (o) However clearly therefore we may be able to demonstrate the truth of our own system, upon principles even drawn from natural law, the force of which is evident to us; I cannot conceive how it can follow, if those principles are not allowed by all the world, that all the world shall be bound to submit to them as if they were. Natural religion therefore can do as little towards enforcing the obligation upon ALL, to pursue one particular system of conduct, as natural feelings or conscience; since neither the one nor the other prevail in sufficient *universality*, to warrant the assertion that the whole world are bound by them in the same way. We may therefore not unreasonably make use of the same argument against NATURAL Religion, distinct from REVELATION; as that which has been used against NATURAL MORALITY, distinct from natural religion. Some of our antagonists themselves allow that morality without religion is nothing but a house built upon the sand; (p) and are forced to own the inefficacy of Pagan religion, when with an anti-ent father of the Church, they complain that it made an illegitimate separation between morals and divine worship; between mere ministers of ceremonies, and the teachers of wisdom. (q)

Now then, let any man set himself to examine what may be meant by that which is usually called MORALS, if considered as independent of revealed religion; and he will probably find, that it does

(o) Inquiry concerning Virtue. 51.

(p) Mais faites les plus beau Systeme du Monde; si la Religion n-y-entre pour rien, ce ne sera guerres, pour ainsi dire, qu'une Morale Speculative, vous baterez sur le Sable.—Barbeyr. Pref. to Puffend. 23.

(q) Id. Ib.

not mean merely *one* certain mode of action, as practised by particular men ; but any set of actions, which any class of men may chuse to devise, provided they do not take their rise from licentiousness, or absolute will, or caprice ; but from regular principles, followed up by practice. So that even though one class of men should be able to prove to themselves, that the principles assumed by another class are false ; yet if they cannot prove it to the satisfaction of the latter, the latter are not the less bound to continue to observe them.

And this will be evident to any one who considers the original meaning of the term *morals*, or *Mores* ; which is nothing more nor less than *CUSTOM, PRACTICE, ACTION* ; proceeding upon some *known* rule or institute. (r)

The Institute itself is indeed *UNIVERSALLY* intended to produce the happiness, or in other words, the *Good* of those who pursue it ; because the history of man proves to us, that he proposes *happiness* or *good*, as the end of all his Constitutions ; but what the character of the Institute shall be ; that is, “ what particular actions shall be forbidden, and what enjoined ” ; will depend upon the varying ideas of happiness, or good, in those that form it. — That happiness is the same thing as what is so well known under the name of the *SUMMUM BONUM* ; and it has been well defined to be, “ a thing which is desirable ; not for something else, but for itself ; that is, “ it is the end to obtain which, every thing that is “ done or commanded, is but as the means. The “ Sportsman believes there is good in the chase ; “ the man of Gaiety in his intrigue ; even the “ Glutton in his meal. We may justly ask of “ these, why they pursue such things ? but if they “ answer, they pursue them because they are *Good* ;

(r) Gesner. Thes. Ling. Rom. voc. *Mores*.

“ it would be folly to ask them farther, why they  
 “ pursue what is GOOD? It would seem then, the  
 “ grand question was, what was GOOD? For whe-  
 “ ther it be the intrigue, or the chace, or the meal,  
 “ may be fairly questioned, since men in each in-  
 “ stance are far from being agreed.” (s)

Such is the opinion of a writer, of no small fame for clearness of intellect; and upon the supposition that his opinion is just, we may carry the principle it contains, from individuals to Nations; and although we may discover that the end proposed by the laws, maxims, and customs, of different races of people are very different from one another, we may be warranted in observing that all of them while independent of one binding Religion, are equally Moral, so long as they bona fide believe that GOOD is their end. Hence therefore, the morality of any particular set of actions is not impugned, because they are objects of horror and detestation to people pursuing another set; and those of mankind who have not had the advantage of one common religion, or one common code of laws, to prescribe to them with AUTHORITY; may, and do often tear one another to pieces, equally and alike upon principle, and the pursuit of what, abstractedly considered, is RIGHT. For RIGHT in general terms, to use the language of one of the most sensible expounders of the Science before us, “ is nothing more than conformity  
 “ to the rule we go by, whatever that rule may  
 “ be.” (t)

“ VIRTUE,” says another respectable authority,  
 “ is the conformity to a rule of life, directing the  
 “ actions of all rational creatures with respect to  
 “ each other’s happiness; to which conformity eve-  
 “ ry one is in all cases obliged :” (u) But granting,

(s) Harris Hermes. p. 297. 3d Edit:

(t) Payley, Mor. Phil. B. 2. ch. 1,

(u) Bp. Law’s Pref. to King on the Orig. of Evil.

what cannot be denied, the obligation to conform to the rule *once established*; still, what the rule shall be, is left unsettled; and the obligation upon all, to observe one particular conduct, remains floating in as much uncertainty as ever. For we cannot too often observe, that the contest all the way through, is not so much to determine *how* obligation to obey a *particular* code is produced; as to shew that there may be *various* codes, according to the varying ideas of men; a position which seems to be allowed in another work, by the last mentioned author himself, when after having taken notice of the disparity between the abilities, tempers, opportunities, situations in the world, or governments under which they live, which is to be found in different men; he emphatically adds, "To speak therefore of *one, fixed, immutable, and universal* law of nature, is framing "an imaginary scheme without the least foundation "in the nature of things, directly contrary to the "present order of the **WHOLE CREATION.**" (zw)

(zw) Considerat. on the Theor. of Religion. p. 4. "Virtue," says Archdeacon Paley, "is the doing good to mankind. in obedience to the will of God and for the sake of everlasting happiness." Mor. Phil. B. 1. ch. 7.) This definition is thoroughly sound. But the hope of everlasting happiness can be made out with certainty, only by revealed religion. Nor can there be any other motive from Nature alone, sufficient to oblige us to virtue, *should we not be inclined to it*, unless it were shewn, (which never has been done,) that virtue is not only the best means of obtaining Happiness, but is in fact the same thing with it. The definition is no where incompatible with our System, and in part, supports it.



## C H A P. III.

## FOUNDATION OF THE LAW OF NATIONS.

AND thus from any thing we have yet seen, neither natural CONSCIENCE, nor even RELIGION, considered a-part from REVELATION, are able to produce that *certain, universal, and immutable* scheme of duties, which we must suppose to be acknowledged by the whole universe, before we can make out from natural law alone, the particulars of what is meant by the definition of the Law of Nations, which we considered in the beginning of the last Chapter.

(a)

It was in mercy to mankind, divided, led astray, and afflicted with these discordant ideas concerning the only thing, which if they all thought alike of it, would indeed force them to consider one another as brethren; it was to remedy, either the inefficacy of the natural law to produce a *general* and uniform virtue; or the total loss of the law itself; that, that high and glorious gift contained in the CHRISTIAN dispensation was bestowed upon the world.

By this, more certain indications of the power, and attributes of the Creator were given to men.

Their duty was set before them with precision, and simplicity; and above all, reasons for it were assigned, which, where they are allowed, must put an end to all doubt, and carry obligation to the most ignorant mind.

The very existence of this dispensation, proves to us, I think, the want of power in the system called

(a) Of President Montesquieu.

the law of nature, to enforce those moral duties in all their universality, for the universality of which so much is contended.—For why, might it be asked, was this wonderful revelation bestowed upon mankind, with all its splendid train of miracles, and martyrdoms, and the long continuation of the divine interposition, which has afforded so many handles for *Infidelity* to lay hold of; if every thing which it was meant to bring about with respect to Morals, could have been done without it? Why also that complaint which with the greatest justice is in every body's mouth, that if Religion were banished, the whole people would be corrupted; the practical truth of which is brought home to our own times in melancholy force, from the contemplation of what has passed among the French; and the consideration that nearly all those amongst ourselves who seek to disturb the peaceful order of things, are professed Deists, or followers of Reason; that is, whose moral principles can seldom be fixed or generally understood.

Now although very refined Intellect, attended with the advantages of much leisure and meditation, has sometimes been able to form a very virtuous system of morals; and one or two were formerly able to make out something like the doctrine of rewards and punishments; yet it was so enveloped in obscurity, and so fragile, from insufficient elementary principles, that the *generality* of men could not enter into them, because they could not feel their force; and the generality of men can not be supposed to be bound by laws which they do not understand. Whereas there is this invariable advantage which the meanest Christian has over many of the proudest Philosophers; that he can immediately set forth the plainest, and at the same time, the most forcible motives for living a life of virtue; while the latter is  
often

often lost in paradoxes, or forced to deduce his consequences from positions of his own assuming. (*b*)

It may be said, and with great reason, that according to our own principles, the laws of Christianity

(*b*) The most exalted state of human reason, says Dr. Middleton, is so far from superseding the use, that it demonstrates the benefit of a *more explicit REVELATION*. For though the natural law, in the perfection to which it was carried by Cicero, might serve for a sufficient guide to the few, such as himself, of enlarged minds, and happy dispositions; yet it has been so long depraved and adulterated by the prevailing errors and vices of mankind, that it was not discoverable *even to these few*, without great pains and study, and could not produce in them *at last*, any thing more than a *hope*, never to *full persuasion*; whilst the greatest part of mankind, *even of the virtuous and inquisitive*, lived without the knowledge of God or the expectation of a Futurity. Middleton. Life of Cicero. 2. 562. note x. Quarto.

The necessity for revelation to minds that are not able to make out the law by reason, is also acknowledged, as it were in spite of themselves, by Suarez and Puffendorf, those great supporters of the contrary opinion. (Suarez De leg. ac Deo. legiss. L. 2. C. 4. S. 9. and Puffen 2. 3. 20.) The latter there confesses that there is some reason to imagine that God himself *taught* the primitive men the chief heads of the law, which were afterwards spread and preserved by Education. Those indeed who do not attribute so much as Lord Kaimes to the brute ignorance which the System of the State of Nature supposes, may reasonably believe in the Creed of our fathers, and imagine that

....., . . . God or Angel Guest,

With Man as with his friend, familiar used

To sit indulgent.

If so, a fair question may be raised, whether *all* religion was not originally revealed. (See a little tract written by Dr. Doeg, entitled Letters on the Savage State, and addressed to Lord Kaimes.) A doubt is there not unreasonably started, whether it is even possible for *Savagism* to improve, *if left to itself*. Bp. Butler himself in another work allows, that Natural Religion before Revelation, was so clogged with Superstition, "that it was totally corrupted, and in a manner lost." (Analog. Part II. Ch. 1.) Now the imperfection of Natural Law, or Natural Religion, *as the foundation of any other law*, is equally manifest, whether we say that there is really no such thing; (which we do not pretend to affirm;) or that it is not to be made out in sufficient clearness, while so foul and obscured with prejudice and superstition.

itself

itself are not binding upon those who have never received them. We agree to that proposition, and it is our very point that we should do so; since we observed in the beginning, that if the Natural law was not discoverable with exactness; if it should prove to be little understood, or so incruited with prejudices or ignorance, that we could not come at it with any certainty; we must content ourselves with such a sort of obligation, and such a plan of conduct, as different *classes* of nations adopt, according to their different Religions or Systems of Morality. When these are known, whether they are Christian, or Mahometan, or Pagan, we may give a tolerable guess at the Spirit of the Character of the people, and the genius of those laws which govern their intercourse. When they are not mentioned; and we content ourselves with asserting a particular, and ramified duty, *because recommended by the laws of nature and reason*, we cannot sufficiently depend upon them to be sure of the power of their obligation, or that the precise conduct recommended is in reality binding.

By shewing therefore the necessity and the superiority of the Christian Revelation, we meant simply to point out, the impossibility of the law of Nature to carry with it an obligation to pursue those duties, which are in general only observed under the obligations imposed by CHRISTIANITY; not to assert that the latter obligations extended themselves to all mankind, even to those who were ignorant of them.

Whence then are we to derive the origin of that obligation which is supposed to bind us? Where are we to look for the rule which is to direct the conduct of Man towards Man; and of Nation towards Nation?

We have answered, to that religious and moral system, whatever it may be, which the different men and nations that are in the habits of intercourse with one another, consider of force sufficient to govern their  
 their



their various actions. Of these we may be allowed to speak with certainty, since of these, the first principles, or in other words, the premises, are supposed to be settled and generally understood by those who pursue them; while others, which are too rashly extended to all mankind; are for the most part fluctuating, and even after being fixed, are liable to be changed. It follows therefore, if our principles are allowed, that the greater number of the writers on the subject, high and deserved as is their reputation, have attempted too much in setting out from such vast and extensive principles; or in laying down the laws of Nations, as if they were the laws of the World.

General principles should undoubtedly be extensive; but they should not be the less certain for being so; and if they are too extensive, so as to become vague, or contested, the Theories which are founded upon them are liable to be misunderstood, perpetually discussed, and even overturned.

Rejecting therefore the laws of NATURE and REASON (as the sole foundation of the law of NATIONS,) because we do not conceive them powerful or fixed enough, to bear the fabric that is erected upon them; we conclude that what is commonly called the law of nations, is not the law of *all* nations, but only of such SETS or CLASSES of them as are united together by similar religions, and systems of morality. It will depend therefore upon the soundness, or unsoundness of those religions and systems, whether particular nations will pursue the particular scheme of morals, which with *us* are called virtuous, or not. If the system is well founded, we may expect the law to be of one certain cast; and of a virtuous character. If it is not well founded, the law must be uncertain, fluctuating, and of a Character perhaps detestable to many other nations. As a plain consequence it will follow, that, if two Systems are

are totally different, (which may sometimes happen,) (c) the CLASSES of nations which are governed by them, can have very little like a law, common to both, to direct their intercourse, and may even therefore be always, or almost always, in a state of hostility. Hence also a corollary may be deduced, that the proportion of obedience which is yielded by any two nations to a *particular* rule of conduct, “must depend upon the degree of affinity which there is between their Religions and Systems of Morality.”

With us in Europe, and the nations that spring from us, the moral system is founded upon REVEALED RELIGION. In other words, it is the same with CHRISTIANITY itself. The great plan of our duty; the complexion of our minds; our ideas of justice; our softened manners: our laws and customs; and consequently the whole force of our moral obligation, take their rise and colour from the CHRISTIAN Religion. But if this is so in all our private relations; in the “charities of kindred,” and the character of our municipal laws; it is but a natural consequence that the same leading and essential principles of action, should influence the whole body of our LAW of NATIONS. Various other causes have no doubt concurred to produce that difference, which in the progress of our investigation we shall probably discover between the European Law, and that of other classes of people; and to these we shall direct our attention in the proper place. For the present we content ourselves with barely pointing out what seems likely to be the true foundation of every Law of Nations, as it may appear to govern the different divisions of the world.

In the next Chapter we mean to come to the more particular application of these principles, and to shew how what is here only laid down a priori, and in theory, is borne out by the practice of mankind. We shall there take a cursory view of the different

(c) See the next Chap.

principles which seem to actuate various SETS OF CLASSES of people, as they fall into different districts, and observe different religious and moral systems; which if it cannot be shewn, we confess that the truth of our Theory, though it may not be totally destroyed, will be wholly without support.

But farther also, if our principles are allowed, the Law in question, must not only be different in different districts of the Earth at present; but even in the same district, it must have varied in the course of time, in proportion as revolutions have happened in the religious and moral systems of its nations.

To the examination of this point we shall also hasten, and it will be our ultimate task, in order the better to prove the truth of our positions, to trace the whole progress and *changes* of the law among the *European* States; to attempt to point out the causes of those changes; to settle their chronology; and to mark the connections and duration of their effects.

C H A P. IV.

THAT THE LAW OF NATIONS, IS NOT THE LAW OF  
THE WORLD.

WHOEVER has considered the variety of Character which is every where the attendant of Humanity; the different divisions of Men into different districts, and almost into different species; the diversity of customs, of religion, and consequently of morals; the notions of right and wrong, extremely opposite in distant places; the prejudices and manner of life, arising from Climate or geographical position: whoever has considered these things, would be led, it should seem, to imagine *a priori*, that there was a marked and pointed difference, among different classes of nations, in their mode of carrying on their intercourse together—It has a palpable effect upon the genius of their civil law, (d) and we may not unreasonably believe that it has the same on their law of nations; so that when by chance, curiosity, or mutual wants, nations that have never heard at all, or heard but little of one another, come to have communication together; the manner of that communication can hardly be the same with that to which they have been accustomed—I do not here speak of the mere *ceremonial* of the meeting; for that, as might naturally be expected, would be almost as diversified as their dress or language; but of those laws, and notions of the nature of their mutual rights, which it is the interest

(d) See Montesquieu Sur les principes qui forment l'esprit gener. De l'Espr. des Loix, L. 19.



of all who are concerned to obey, for the sake of the safety of the communication.

The History of the World, and the accounts of observing travellers, tend very much to confirm the strength of this opinion.

In some countries, *Theft*, though prohibited by the inhabitants among one another, has been permitted towards Foreigners. (e) With one nation, a *Stranger* has been received with open arms as a Citizen. By the same people, when their political situation was altered, he was reduced to captivity. (f) By another he has been put to death from the mere circumstance of his being a Stranger. (g) With a third, he is hardly permitted to land, should he come upon the coast, and never to advance into the interior. (h) With a fourth, it was even part of their religion to kill him if he be a Christian. (i)

When war breaks forth, the varieties of the modes in which it is pursued are without end. A *Roman* thought it right to give notice to his Enemy, and summon him first to do Justice, before he declared himself. An *Indian* will lie for weeks in the grass, and wreak his vengeance upon the offending party without any declaration at all. A *Christian* treats his prisoner with courtesy, and dismisses him

(e) Among the antient Germans, the inhabitants of the South Sea Islands—The Arabs, and Tartars, &c.

See also Busbequius' account of several Turkish nations which he visited, among whom he who was held an expert *Thief* was esteemed a great man, and he who was the contrary was looked upon as a mere stock or trunk. Qui dextro Mercurio furatur, magnus censetur: qui nescit, ut stipes et truncus despicitur: in eo vix communi luce dignus judicatur.—Leg. Turc. Epist. 3.

(f) Vide infra Chap. VI. concerning the Greek and Roman Law.

(g) By a law of *Bustiris* in *Ægypt*, and the customs of the *Scythians* who immolated Strangers to *Diana*.—See Puffend. reasoning upon these customs. D. de Nat. & des Gens. 2. 3. 9.

(h) The law of China.

(i) The Mahometan law.—Alcoran, Ch. 8. 40.

*now* without ransom; (k) A *Turk* condemns him to miserable Slavery. Vast Empires as we have seen are in the practice of *sacrificing* their Captives, in a manner the most horrid, out of duty to their Gods: Other Savages will pour molten lead down their throats, or confine them for years in dungeons in the common mode of punishment; Others again, will tie them to stakes, and eat their mangled and half roasted flesh before their faces, out of a principle of honour. One tribe of men, will poison their weapons; Another, will make use of none that do unnecessary mischief: Among one set of people, a *Pirate* is almost a term of honour: Among another, he is hanged as a Thief. With one Sovereign, an *Ambassador* is the most sacred of characters: With another he is considered as a mere hostage for the good behaviour of his nation.

This diversity of custom is endless; yet all the nations thus differing in their mode of intercourse, imagine they are pursuing a conduct warranted by Laws which are common and well known, and the contrariety is most marked between countries that are most distant, and most separated by religious opinions.

The GOD of WAR, was almost the only GOD, worshipped by our *Scythian* ancestors; and the state of their part of the world, was accordingly a state of perpetual war. To mix and to die in the battle, in order to drink from the skulls of Enemies in the Hall of ODIN, was a part of their religion, and dearest ambition; and he was disgraced who had not well earned these honours. A people however of this stamp, could never be brought to listen to doctrines, or to attend to laws which called for the

(k) For the account of Ransom, as it formerly stood, see Chap. 9.

observance of peace and order, such as the Christians held out, and comparatively practised. (*l*)

When the New World was opened to the spirit and adventure of the Old, it was reasonable to expect what was found; new laws and customs, as well as a new people and language. But on that very account it was not reasonable to expect, that the intercourse between the Spaniards and the Mexicans should be governed by the same customs as the intercourse of Nations in Europe: nor, if the latter sacrificed their prisoners to their Gods, could the former fairly complain of it as a breach of the Law of Nations. Yet to the astonishment and horror of every thinking and good mind, this was one of the charges on which the innocent and unfortunate monarch of PERU, was put to death by the ruthless PIZZARO. (*m*)

Examples might be drawn out to a length, even fatiguing, to show how opposite the general notions of States have been at various times and places, and how little it can be expected to find a similarity of sentiment or of conduct, except among particular nations only, few in comparison with the rest of the world.

Such nations indeed we may reasonably suppose to be governed by the same law, which is rendered the more necessary, as their intercourse is more frequent; they will naturally at least, pay higher respect to customs which are known and received, and which accommodate themselves to their own prejudices; than to others, of which they know nothing which they do not understand, or which may even be repugnant to their dearest and most favourite principles.

(*l*) See Chap 7. on the Scandinavian Law of Nations.

(*m*) Robertson's Amer. 3. 46. Atualpa was even tried by a Spanish Court of Justice.

According

According therefore to our former observation, we find that the world is for the most part *carved out*, as it were, into different *Sets of Nations*, all of them understanding one another; and the alliance is the more strict, according as they are bound by the same political system, the same interests, the same religious prejudices, or the same geographical position.

The latter is of great importance. The whole spirit and genius of a People may take, their rise from their situation on the Globe; and they are Shepherds, Husbandmen or Merchants, according as they find themselves placed in Mountains, in Plains, or on the Coasts of the Sea. Each Class of People may be said to have a different Law of Nations; and with the latter this remarkable circumstance almost invariably attends them; that that which seems the most transient, the most evasive, and the most common of all the works of nature, becomes a fixed permanent property, through the avarice of man. Wherever a spirit of commerce has prevailed, the Sea has become as much an object of contention as the Land. The possession of certain Fisheries, and the right to a particular Navigation, have every where been points of the utmost importance in the Politics of the Nations interested, and given birth to certain regulations and laws, wholly indifferent, if not wholly unknown to Nations of an opposite character.

The account and history of *all* these various laws in different parts of the world, and at different æras of improvement, would be a work of no mean consequence to a mind of enlarged enquiry; (*n*) it

(*n*) A slight enumeration of some few of them has been made by Dr. Falconer, in his Remarks on the Influence of Climate. B. 6. Chap. 3. Some of them also are to be found scattered up and down the bulky work of Anderson on Commerce.



is not however the object of the present dissertation to attempt it.

Thus then, distinct Classes of Nations have distinguishing Sets of customs.

The North American INDIANS have one; the INDIANS of the South Sea another; The NEGROES a third; the GENTOOs a fourth; the TARTAR Nations a fifth; The MAHOMETANS a sixth; The CHRISTIANS a seventh, and so on.

With the two last, their Religion had in other times an evident, and if I may so say, a *formal* effect, upon their Law of Nations. The follower of MAHOMET was commanded by the volume of his duty (o) to wage war on Christianity, and to slaughter its professors; and his very mode of making proselytes was by the sword. (p)

On the other hand we find nothing so common in the public affairs of Europe, (more particularly in former times, when its danger was more to be dreaded,) than to take arms for the defence of Christianity against the Turks; and the Family of *Austria*, whose power and zeal in that service were greater than others, derived at one time, much profit from an attention to these prejudices. (q) of the same nature with this, were the motives for those desolating wars known by the name of CRUSADES; in

(o) Alcoran, Chap. 8. 40.

(p) See Mod. Un. Hist. i. 248. Octav. In more antient days also, the profession of Christianity was the cause of enmity from the Persians to the Romans. "I will never give peace to the Emperor of Rome," (Heraclius) said Chosroes, "till he has abdured his crucified God, and embraced the worship of the Sun."—Gibbon's Dec. and Fall, Cha. 46.

(q) A compliance also with these prejudices, formerly produced an opinion in England, that it was against the Common Law to make a Treaty with Infidels. 4 Inst. 155. See the Chapter on the Influence of Treaties and Conventions.

which

which the extirpation of Infidels, and the recovery of a Country fairly possessed according to the maxims of the world ; (r) were held out as legitimate and equitable causes for war, merely from the sacredness of the prejudices in its favour. It is needless to point out how little this could be admitted by nations who never had heard the name, much less of the history, and who could not possibly understand the nature of the Divinity of Christ. (s)

The community of worship however is considered by Grotius as so great a bond of political union among the Christians, that in that part of his work which treats of Alliances, he holds that no *Christian* State can be excused from assisting another, when attacked by *Infidels*. (t)

This profession of the same Religion, marked out the European Nations as distinct from the rest, in various other ways. To preserve the peace of Christendom, and spare the effusion of *Christian Blood*, was always, and is at this day, a favourite and popular reason given by one State, for its interference in the affairs of another.

The Pope indeed, as the common Father of Christendom, was the directing member, or more proper-

(r) The Holy Land had been in peaceable possession of the Infidels for five hundred years when the Crusades broke out.—Maimbourg. Hist. des Crois. L. 1. An. 1093.

(s) To uphold the Glory of the Almighty, to recover the Kingdom of Christ, and to promote the good of the true Believers, were the professed causes of those celebrated wars, in which the West and the East were in arms against one another, with very little interruption, for a space of four hundred years; Maimbourg himself even so far down as the last century, seems to think that they were acceptable to God. "Ou plutot," (says he, speaking of Peter the Hermit) "que Dieu, qui avoit choisi cet instrument pour faire eclater sa puissance et sa gloire, &c. Id. Ib.

(t) De J. B. et P. 2. 15. 12. He possibly however means only in those cases where the existence of the common religion is absolutely threatened; as long before his time, the Turks were received into the political connections of Europe. Vide infr. Chap. XV.

ly, as we shall see, (*u*) the Despot of a very strict Alliance between States, in other respects, as independent of one another, as the most distant and unconnected Nations. Accordingly, no feature in the history of Europe is more striking than that vast and frequent assemblage of all the Sovereigns of Christianity, or their Representatives, in what were called the *OEcumenical Councils*. In these, many things were settled exclusive of mere points of faith; more particularly, the precedency of Nations, the rank and power of Sovereigns, and not unfrequently their right to their Thrones themselves; points which it is palpably the province of the Law of Nations alone to determine. (*x*) Rank and precedency were even made to depend, amongst other things, upon the priority of conversion to the Christian Religion: (*y*) an express division was made of those who professed it, into four quarters; (*z*) and the very name of *OEcumenical Council*, according to Father PAUL, was derived, after the division of the Western from the Eastern Empire, from the unity and communion of those States and Countries which obeyed the POPE. (*a*)

Even the division of the same Religion into different sects, may sometimes produce a partial alteration in the Law of Nations, according to their tolerance or their bigotry. The superstition of the Roman Ca-

(*u*) Vide infra. Chap. XII.

(*x*) Frederick II. one of the most active Emperors of the House of Suabia, was deposed at the Council of Lyons, held expressly for that purpose by Pope Innocent IV.—Mat. Paris, 672. But see this subject amply discussed, Chap. XIII.

(*y*) Mackenzie's Law of N. as it concerns precedency, Page 6. —Howel on Preced., 9, 10, 11. See also Cotton's brief Abstract of the quest. of Preced. between England and Spain, preserved in the Harleian Manuscripts.

(*z*) Italy, Gaul, Germany and Britain. (M. S. Cotton's Preced. of Eng. and Spain.)

(*a*) Fr. Paul. in Pref. Con. d. Trent.

tholics,

tholics, particularly in former times, had an evident effect upon some of their laws with respect to the privileges of Stranger Nations, who thought differently from themselves ; and while the Reformation was in its infancy, attempts were not unfrequently made to cut off a right universally held to depend upon the Law of Nations, namely, that of Ambassadors to the free exercise of their own religion. (b)

It is more evident in the manner in which various Colonies have been settled, according as the religious notions of the Settlers were liberal or confined. PENNSYLVANIA was purchased by fair treaty from the Indians, by the equitable and tolerant QUAKERS ; the Indians of South America were reduced to Slavery by the SPANIARDS, upon the pretence of converting them more easily to Christianity.

The same diversity of Spirit appears in a variety of other instances ; and whenever a conduct is adopted in the course of War or Peace, contrary to the approved customs of Europe, though consonant with the practice of other parts of the world, it is a fair ground for complaint. Thus when the Duke of Guise, had put some Spanish soldiers, whom he had taken prisoners, into chains ; it was made the subject of loud complaint by the Spanish Ambassadors at the Congress at Vervins, as contrary to the Laws of War, and the humanity which ought to be observed among Christians ; who never, said they, treat their prisoners as if they were Turks. (c) By the *Turkish Law of Nations*, therefore, this treatment was not illegal ; a clear proof that there were more laws than one. It is no doubt in conformity with this spirit also, that with some Nations we are forced to make express *Treaties* to deliver ourselves from piracy and slavery ;

(b) Wicquef. de L'Ambaff.

(c) Lettre du 26 Fev. au Roi. 1598. Mem. de Bell. et Sull.



while among our own, (that is, in EUROPE) the law observed by it, is sufficient protection without them.

Again, it is an opinion generally inculcated, and deservedly so, that from the relationship of all the World, we ought to be hospitable and kind to *Strangers*, whether they come from the East or from the West; whether they adore MAHOMET, or CHRIST; and this forms a very fair part of the *European* Law of Nations. The *Turks* however are taught by their religion so to hate and despise the *Christians*, that the epithet "*Christian Dog*," is every where bestowed upon them. It is even forbidden them in many parts to make use of so noble an animal as the Horse, and they are forced, as a mark of submission, to content themselves with the humbler Ass, whenever they appear in public. (*d*)

It is generally inculcated, that Strangers should be equally protected in their property with Natives; and any public violation of this rule, authorised by an *European* government, would raise an universal outcry against it among the surrounding States. A very few miles by land or sea, bring us to countries whose existence almost depends upon the pillage of Travellers; and were you to preach the observance of your own customs to a *Tartar*, or an *Arab*, he would not understand you.

There is another very strong shade of difference between EUROPE and other parts of the globe, which powerfully confirms the supposition we have started; and that is, the remarkable opinion entertained by all European States respecting that famous part of the Droit Public, known by the name of the BALANCE of POWER. Of this, according to the present system, the people of Antiquity, knew little or nothing; and it was unknown even to modern

(*d*) For this, and many other indignities, see Gibbon, Dec. and Fall, Chap. 51.

Nations themselves before the time of CHARLES the Fifth. There is indeed a kind of natural policy, which self-preservation will suggest to all States, of uniting against one common powerful enemy, whose hostility is open and flagrant; and this is to be met with throughout the World: But no SET of NATIONS, that I have yet heard of, except the moderns of Europe, have laid down a *System* to prevent *long before hand*, even the *just* Augmentation of any particular Power, which in the end might prove detrimental to the rest; nor were any SET of NATIONS before these, so connected together by *Treaties*, *Alliances*, *Guaranties*, and various other ties, that the present state of things can hardly be altered without the common consent. The fear of such an accession of power as may prove fatal to the independence of Europe, is now held to be a fair cause for War; and Nations without sense of *immediate* injury, or wish to avoid *immediate* danger; consequently, without personal hate or passion, now join chearfully in the most dreadful conflicts to which the lot of Humanity is liable; a circumstance which may be considered as one at least of the causes of that polish and mildness which regulate the more humane mode of modern warfare.

An attention to this great variety in the common governing principles of action, which certain Communities entertain to the exclusion of others; has drawn from the Writers on the Subject, strong *hints* of the soundness of the opinion we have adopted. I call them hints, because no treatise that I remember to have seen, has yet set it down as a broad uncontroverted proposition. But though no positive assertions are to be met with to this purpose, yet from a combination of the general views of the matter that appear to have been taken; the sense of various authorities is almost as clear to the point, as if it had been expressly asserted.

M. De

M. De Callieres, in his book called “ *La maniere de negocier avec les Souverains*,” confines this Negotiation to the *Sovereigns of Europe*. “ In order the better to understand,” says he, “ the utility of Negotiation, we must consider *all the States of Europe as having such intimate connection together, that they seem to be the members of one and the same Republic*.” (e) To this purpose also are the sentiments of other writers, as we shall hereafter have occasion to demonstrate.

In the treatise de Foro Legatorum, by Van Bynkerkshoek, there is a very strong *implied* opinion in favour of our system. A question is made in the nineteenth Chapter, how far any one Nation has the right to take from Ambassadors, the privileges awarded to them by the law of Nations. The author is clear that it has that power, provided it declares its intention before hand; for, says he, the enjoyment of all their privileges depends upon *consent*. One Nation can impose no obligation on another, nor can the consent of all the Nations in the World together, force any one free State, single as it may be, to follow their customs, if it chuses to adopt others.—This opinion is founded upon that of GROTIUS, which holds that though it is contrary to the received Law, to try an Ambassador in the courts of the country he resides in; yet before he is received in the country, it may be *stipulated* that he shall so submit to them. (f)

VATTEL, also, adopts it in all its extent, when he comes to that part of his subject. (g) But if these  
 Authorities

(e) De la man. de neg. Chap. 3. but vide *infr.* the subject pursued historically, particularly Chap. xiii.

(f) Grot. D. J. B. et P. 2. 18. 5.

(g) “ Voyons donc quelle obligation la coutume, l’usage reçu, peut imposer aux Nations, non seulement en ce qui regarde les ministres, mais aussi en general sur tout autre sujet. Tous les usages, toutes les coutumes des autres Nations, ne peuvent obliger un Etat independant, sinon en tout qu’il-y, a donné son  
 “ consentement



Authorities are allowed, it is clear that the Law may be totally altered, according to the Will of particular Nations; and if so, it can never be supposed, from the mere force of the term, that it is binding upon all the World.

If Authority however, were still wanting, GROTIUS and SUAREZ, are so full to the point as almost to decide it. "The Law of Nations," says the first, "receives its force from the consent of all Nations, or at least of many of them. I say many, because there is scarce any Law, but that of Nature, which is common to all the World. Nay, there may even be found in one part of the Earth, a Law of Nations, which is not known in another part of the Earth; as we shall demonstrate in its place, when we come to speak of Captivity and Postliminium."

(h) Of the same opinion is Suarez, who affirms in different parts of his work, that the law in question may be changed as far as it depends upon the consent of men; that it may be changed by any particular Kingdom or Republic; and even, according to some, by private authority. (i)

It

"consentement exprès ou tacite. Si quelq'une y decouvre dans la Suite, des inconveniens, elle est libre de declarer qu'elle ne veut plus s'y soumettre, et sa declaration une fois donnée bien clairement, personne n'est en droit de se plaindre, si elle n'a aucun egard à la Coutume."

Droit des Gens. L. 4. Ch. 7.

So also Bynkershoek, "Gens Gentem non obligat, nec vel omnes Gentes obligant aliam, licet solum, qui sui juris est, et aliis legibus uti decrevit."

De For. Legat. C. xix.

(h) "Jus Gentium, id est, quod Gentium omnium aut multarum voluntate vim obligandi accepit. Multarum addidi, quia vix ullum Jus reperitur extra Jus naturale, quod ipsum quoque Gentium dici solet, omnibus gentibus commune. Imo sæpe in una parte orbis terrarum est Jus Gentium quod alibi non est, ut de Captivitate et Postliminio suo loco dicemus." Le J. B. et P. I. 1. 14. 1.

(i) Quarto ex dictis colligitur Jus Gentium esse mutabile quatenus ex hominum consensu pendet; in quo etiam differt ex Jure naturali.



It is very true that *Burlemaqui* contends, that variations, when they are cruel, are mere barbarous customs, from which all just and well-regulated Nations ought to abstain. (k) But surely, when the very question is concerning the *universality* of a custom, and other customs are proved to exist; to get rid of them in this way, is a mere *petitio principii*; not to mention that the Nations thus adopting other Laws, have an equal right with any other, to call themselves (according to their own ideas at least,) just and well-regulated. (l)

Among the antient *German* People, the death of a man was not considered of that high consequence, which the purer doctrines of Christianity, and the more regular policy of modern States give to it at present; hence every murder, however atrocious, had the penalty of a fine in money set upon it, as the only punishment. When the jurisprudential Writers, however, come to consider the Nature of the power of punishment; they all lay it down, that crimes against the Law of Nations, are punishable by *all* Nations; whether those who have received the injury or not: and among those crimes are expressly in-

naturali. Imo dicunt aliqui posse mutari a privata auctoritate. Ratio est quia res prohibita Jure Gentium simpliciter, non sunt malæ de se, et intrinsece.—Suarez, De Leg. ac Deo Legis. L. 2. C. 20. S. 6.

Nam prius Jus, potest immutari a particulari regno vel republica, quantum ad ipsum, &c. Id. L. 2. C. 20. S. 7.

(k) Du Dr. Nat. 2. 6. 8.

(l) We have unfortunately, in the present times, experienced too strong a proof of this. The miserable departure of the French from that humanity which has constituted the distinguishing honour of modern warfare, however execrated by all good men, is considered by themselves *as an elevation of their character*.

I have already, in the preface, disclaimed all personality or passion, in any thing I may be forced to remark concerning the French. The present example is evidently the best proof that could be cited in the simple course of the argument; and wholly, therefore, independent of all personal feelings as an Englishman.

cluded

cluded Murder, and even Adultery. (*m*)—The doctrine is just with respect to those Nations that obey the Law; but it would be surely too much for any one to assume the power of inflicting death (the punishment commanded by it) upon a murderer of that Nation, which, like our *Saxon Ancestors*, compounded the injury for a sum of money.—Still less could it be expected that a man, whose very religion perhaps admitted of a community of Wives, should know he was committing a crime, in merely conforming to his customs, because *other* Nations chuse, however reasonably, to consider it as a breach of *their* Law.

We have already observed, (*n*) that some authors have called incestuous marriages, in the ascending line, a breach of natural right; and they hold also, that, according to natural right, any man who has offended against Nature, may be punished by him who has not. (*o*) Now the Persians and Assyrians, as has been mentioned, in many cases, not only permitted, but held the offspring of such marriages in honour. (*p*) It would be absurd to say, that according to the *Law of all the States of the World*; any one of them could justly punish the Persians and Assyrians for these acts, however abominable!

From all that has been said, a very easy exposition is to be deduced of a remarkable phrase of the President MONTESQUIEU; remarkable however only in the case, that his opinion on this subject is different from ours.

(*m*) 4 Institute 153. Coke there goes so far, as to call even Felony, a crime against the Law of Nations.—It would be needless to shew the injustice of punishing a Foreigner (though of Europe) for a crime, of which he might know nothing.

(*n*) Chap. II.

(*o*) Grot. D. J. B. et P. 2. 20. 3.

(*p*) “ Si les Assyriens, si les Perses, ont épousé leurs meres, “ les premiers l’ont fait par un respect religieux pour *Semiramis*; “ et la seconde par ce que la Religion de *Zoroastre* donnoit la pré- “ férence à ces Mariages.”—Montesq. De L’Esp. D. Loix. L. 26. Ch. 14.

When

When he speaks of any Nation, or Set of Nations, as the Tartars, and others, he says, *the Law of Nations is so and so*; a clear proof that he thinks there are different laws of Nations existing in the World. Thus says he, the law of Nations of a people who are yet in the *Shepherd* state, has for its subject, what among more civilized people is the subject of municipal institution. (q) The Law of Nations *observed by the Tartars*, is to *destroy* where ever they appear! (r)

The anonymous Commentator of Montesquieu, does not comprehend how that can be the Law of Nations, which professedly is destructive of all Law. But the answer is plain; it means, that those people who are in this terrible intercourse with one another, *expect*, and *know* that it will be thus terrible; and this very *knowledge* and *expectation*, make it *Law*. In the same manner as the Law of *Turkey*, which vests every thing in the will of the Prince, and which therefore appears *to us* to annihilate *all Law*; is, in fact *to its inhabitants*, the Law of that Country.

We see then the effect of RELIGION, MORALS, and GOVERNMENT, not only upon the genius and laws of particular people, but upon whole Districts of the Earth; and where there are such opposing principles acting upon the minds and conduct of different CLASSES of Nations, it is in vain that you expect them *all* to conform to the same law in their public intercourse; equally perhaps in vain as if you expected the spirit of every Government, and of every code of municipal law, to be the same throughout those States which, according to us, obey the same law of Nations. When therefore we make use of the common expressions, "*the Law of Nations*," or "*the whole World*," they are seldom to be taken in the extensive sense which is implied by those

(q) Esp. des Loix. L. 18. Ch. 12.

(r) Id. Ch. 20.

terms; but always with such modifications as the subject we may happen to be upon, will point out to us. Thus, in relating the transactions of Indian or African Empires, such expressions would merely mean the law of *Indian* or *African* Nations; and the *Indian* or *African* World; and so also, in our own daily transactions in Europe, we mean by them nothing more than the law of the *European* World.

CHAP.



## CHAP. V.

HOW DIFFERENT CLASSES OF NATIONS MAY BE  
DISTINGUISHED.

I AM here aware of a very natural question which has the fairest right to be answered before we advance farther.

If these principles are true, and the world is really so divided, as it is said to be; the division no doubt ought to be marked and clear;—and as every Nation assumes the right of deciding upon the law, it should be known beforehand, what CODES particular States obey, in order to prevent an unjust interference. We may therefore, it should seem, be fairly called upon to shew the exact distinguishing line, by which Nations may be said to belong to this, or to that Class.

It must be confessed that the answer to this, is not without its difficulty; for as there is no common Sovereign Legislator; no general appellant Jurisdiction; it is scarcely possible to point out with exactness, (or indeed any thing approaching to it,) what are the particular States that are held bound to obey any particular Code. From what has gone before however, much may be collected, which, though it may not amount to absolute certainty, will at least prove to us a pretty sure guide in the enquiry.

For example; whenever we observe many different Communities, in the habit of making *Treaties* and *Alliances* together; of holding *Congresses*, and entertaining *ordinary* or *resident Embassies* at one another's Courts; of appealing to each others *Mediation*;  
of

(a) of deciding their differences by *one known settled rule*; (let it be good or bad;) or of carrying on War in the same mode, (be it cruel or lenient;) above all, when we see them governed by the same customs, arising from climate or geographical situation, and bound together by *one common Religion*; then, may we fairly suppose that they agree, tacitly or expressly, to obey the same law of Nations.

One thing is decisive; and that is, when we observe them searching for the rule of their duty in the *same Codes of Jurisprudence*, and agreeing to pay respect to the opinions of the *same Writers*; in which case, it is equal to absolute demonstration, that they all come under the government of the same Law. (b)

With us in Europe, and the Nations and Colonies that spring from us, this has long been the practice. Things for the most part are settled and understood: the same *Laws of War and Peace*, of *Treaties*, and *Alliances*, are obeyed; the same *Maxims* are enforced; the same *Authorities* are cited; the same *Religion* unites us. It is not so with other Nations; and the

(a) See Mably on the mode in which it is likely that the Turkish Empire will in time assimilate itself with the European States.—Droit. Pub. ch. 5. For the progress of these parts of the law in Europe, vide *infra* chs. x. xiii.

(b) Hence when we see a Nation, or its Minister, refuse to acknowledge authorities generally received by other States; it is a clear sign, that it means no longer to obey the old Law of Nations: in other words that it means to withdraw itself from its *Set* or *Class*. We must all recollect the correspondence between the American Government and the French Envoy, *Genet*. Being told that his proceedings were contrary to the spirit of the doctrines of *Grotius* and *Vattel*, he replied, that he knew nothing about *Grotius* or *Vattel*, but that his conduct was conformable to the doctrines of the *French Constitution*. This was either ignorance, or design; if the one, it can form no case; but if the other, it was almost a direct notice, that the French meant to retire from the obedience they had paid to the Code of the European Law.—In the latter case, therefore, *Genet* was not a *Fool*, as he has been called, but merely consistent.

proposition is thus demonstrated, that when *we* speak of the Law of Nations, we mean only the Nations of our own SET, that is, of EUROPE.

But though a particular number of States may be avowedly within the pale of the same Law; it certainly can hardly fail to happen that there may be others barely *upon the verge of it*; and the complexion of their character, is therefore dark and doubtful. These, “may partake of two laws at the same time;” or they may absolutely be under the controul of one, with the rest of the Nations of *their own Class*; while they partially adopt the other, as far as it regards their partial intercourse with the *Nations of another Class*. (c) Such States as these, are for the most part bordering upon one another; or if at a distance, connected in some measure by Trade and Navigation; and such States may be deemed to be *in a kind of Twilight between the two Laws*.

In this situation, the TURKISH EMPIRE seems to have been for some time; governed no doubt in its intercourse with the Nations of the East and South, by the ferocious maxims of those countries; but turning, with a manner somewhat softened, to a connection with the States of the Western World. (d)

In this situation also formerly, the Russian and Polish Nations continued, before they came to adopt our manners and maxims in all their extent; and as it was comparatively late before this happened, they have sometimes been called the mere *Primi Barbarorum*.

The Russians took their place in the *European Republic* through the medium of the Greek Empire,

(c) Per emationem mutuam populorum sine speciali consensu uno tempore facto.—Suarez. Corollary 1. cap. 20. l. 1. De leg. ac Deo, &c.

(d) See a good historical sketch of the connection between the Porte and the European States by Treaty, in Mably Droit. Public. ch. 5.



having embraced Christianity in 989, when their prince Walodimir espoused Anne the Sister of the Emperor Basilus Porphyrogenitus. (e) And it is not impossible that their backward state of civilization and fraternity with the European States, might be owing to this, among other causes; the Greek Empire, though much connected from situation, being different in manner, character, and race, from the German Nations. (f)

The Prussians were even behind them in rank; and their entry into the Class which obey the European Law, was probably marked by their conversion to the Christian Religion.

So late as the thirteenth century, they are described to have been buried in the most profound depth of ignorance and idolatry. They at first lived promiscuously according to tradition, in woods, having neither manners, nor order, till an old man, named WYDEWUT taught them by the example of the Bees the necessity for a King. He himself was the first Sovereign, and in extreme old age, offered himself a voluntary sacrifice to the Gods of the Country. The Knights of the Teutonic Order made holy war upon them, and even in the thirteenth century, such was their savageness, that they sacrificed those that fell into their hands, to their Idols.

By that time however the seeds of Christianity were sown among them; and between the zeal of Missionaries, and the swords of the Knights, they quitted their ignorance and entered into the *rank of the nations of Europe*. (g)

(e) Gibbon, Decl. & Fall. ch. 55. Puffend. Introd. à l'hist. Un. l. 5. ch. 2.

(f) It was the opinion of Montesquieu that Religion degenerated in Russia under the *Greek* Emperors, to the low state in which it continued, till Peter the Great renovated the whole nation in Religious, as well as other matters. (Grand. et Decad. Rom. ch. 22.)

(g) Puffend. Introd. à l'hist. un. l. 5. ch. 1.



How, or when it is, that a people in this situation may be said with accuracy to quit their own SET, in order to enter into another; and by what modes and gradations it does so, is very difficult to be determined. In general however we may observe, that the steps have been very gradual, and the manner by TREATY.

Thus, the connection between *Europe* and the *Mahometan* States, seems universally to have commenced by Negotiation, and Alliance. In former times, their mutual relations were solely those of Enemies.— They exhausted themselves in war; they made peace, not to acquire friends in one another, but merely to recruit their losses; and that which first recovered, was the first to recommence hostilities. (*h*) But the weight and impression of the character of *Charles V.* as they were the cause that the System of Europe was first reduced to something like regular principles; so they extended themselves beyond the bounds of European Politics, and were the means of introducing the *Turkish* power into the *Christian* Confederacy. It was the more effectually to balance his superiority of consequence, that *Francis I.* was driven to encounter the religious hatred of many of his fellow Christians, when he submitted (though not the first as has sometimes been supposed) to enter into alliance with the *Infidels* of Constantinople. Long after his time however, the *Porte* was so ignorant of the affairs of Europe, that till they became acquainted with the power and energy of *ELIZABETH's* character, they believed *England* to be a province of *France*; (*i*) and even then, accorded privileges to the *Dutch*, on the supposition that the *Belgic* State

(*h*) We shall consider this subject more at large when we come to the influence of *Treaties* upon the European Law of Nations.

(*i*) Birch. Mem. of Eliz. 1. 36.

was a dependency of *England*. (k) For a century and an half afterwards, they were but little known except to their old enemies the *Venetians* and *Austrians*, and were visited by more distant people, as the Chinese or Persians are visited, for the sake of commerce.

It may be supposed therefore that little change was made in their maxims of State, or their law of Nations; and, accordingly, the most flagrant breaches of the Law, will generally be found to have happened in our intercourse with *them*.

The growth however of the power of *Russia* in the present century, and the consequent necessity of supporting the *Ottoman* Interest, will probably be the means of their assimilating more closely with ourselves, than ever; as far at least as their religious prejudices will permit.

By Treaty also, the *Barbary* States have at length been induced to assume a character a little, and but a little, more conformable to *European* maxims. Stipulations are inserted in various articles of Treaties that have been made with them, that public Ministers shall enjoy the protection of the Laws of Nations; and what those Laws are, we are forced actually to explain to them.

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We have been the more particular and elaborate, possibly so as to have become prolix, upon this important part of the subject; because though the arguments for our System are sufficiently obvious to any one who attends seriously to them; yet they have not only never till now been collected into one broad point of view, but are actually not often to be collected, except by implication.

(k) Mably. Droit. pub. ch. 5.

No one has yet laid it down in a clear, ample and precise manner that the Laws which are the objects of our enquiry are *not* the Laws of the World ; of course no one has yet examined, how far they obtain with particular Nations ; or how far attention ought to be paid to the circumstance of their obeying another Code.

And here we shall take our leave of the general subject, having demonstrated as far as we are able, the necessity in all speculations concerning the *Law of Nations*, for confining what we say to some one particular *Class* of them, as they are united together under similar principles of action, and similar casts of thought.

The chronological account of the law, as we ourselves have obeyed it in EUROPE ; the strange ideas that were formerly entertained of it, generated by various local and important circumstances ; the gradual changes, (and the causes of them) which took place in those ideas ; together with the last improvements that were given to them, so as to elevate the Law into the rank of the sciences, will be explained at large in the following chapters.

## CHAP. VI.

THE HISTORY OF THE LAW OF NATIONS IN EUROPE  
AS OBSERVED BY THE GREEKS AND ROMANS.

I SHALL not detain the reader by enquiring what Savages were the first who peopled the forests of *Europe*, or examining the state of the intercourse of wandering Barbarians, who had no political importance, and little political communication. In the earliest history of this remarkable quarter of the Globe, two celebrated and interesting *Classes* of people press forward upon our observation, so far superiour to all others, that they divert us from the rest, and entirely absorb our attention. These are the famous nations of *Greece* and *Italy*, the laws of whose intercourse once known, we have little occasion, as far as it concerns our subject, to enquire into those of cotemporary States. They led and domineered in the politics of the world; the mightiest Nations bowed down before them, and took their ideas and their tone, from their will or example. They were equally celebrated in arts, and in arms; they penetrated the depths of Science; they analysed the whole mind of Man; and all that the *unassisted* genius of Humanity could attain to, they made their own in a manner as rapid, as it was almost miraculous.

One thing however was wanting to the perfection which, had they possessed it, they would probably have acquired: and that was, the knowledge of the doctrines of a Religion, which whatever may be its points of controversy, has had the uniform effect, where-ever it has taken root, of producing a more equitable notion of things, and a milder system of manners.

Accordingly,



Accordingly, from the want of this great advantage, we may observe that the People in question, while they were in the first scale of eminence in almost all other respects, fall far short of their posterity in their ideas of the Law we treat of. The want of a principle sufficiently binding in their schemes of Morality, had a palpable effect upon their characters in private life; and, as might be expected, it transferred itself into the spirit of their Law of Nations. However therefore we may be accustomed to hear of their politeness, their arts, their refinements in elegance, or their knowledge of Laws; we find upon enquiry, that their politeness, while it sharpened their understandings, had no effect upon their hearts; that their refinements were for the most part sensual; and when we come to contemplate the general scope of their Laws of War and Peace, they will be found too often to resemble the Barbarians they despised.

One of the most striking Laws of the *Romans*, is that by which, instead of considering every man as a fellow creature between whom and themselves there was an implied alliance; he was deemed a Being to whom they were absolutely indifferent, and with whom there was hardly more connection than with the brutes of the earth: Insomuch that though, (to use the words of the Law) when there was no treaty of friendship with any particular Nation, it was not on that account considered as an Enemy; yet if any thing mutually fell into the hands of each other, it became a lawful prize; so that even if a Citizen of either State came within the territory of the other, he might lawfully be reduced to Slavery, (a)

(a) Si cum gente aliqua, neque amicitiam, neque hospitium, neque fœdus amicitiae causa factum habemus; hi hostes quidem non sunt; quod autem ex nostro ad eos pervenit, illorum fit: Et liber bone, noster ab eis captus, servus fit, et eorum. Idemque est si ab illis ad nos aliquid perveniat. Hoc quoque igitur casu, Postliminium datum est.

Dig. L. 49. Tit. 15. L. 3.

and

and it was therefore one of those cases in which the right of Postliminium had place. (b)

The whole genius of their character, and of their very language, was of a similar cast, and the word which signified Stranger, was the same, both among the Greeks and Romans, with that which in its original, denoted an Enemy. (c) Among the former people, every one who did not speak their language was stigmatized with the name of barbarian;—*βάρβαρος*, meaning literally, one who pronounces a language with an improper accent. This however would not be so remarkable, was it not for the curious rights which they assumed to themselves over these *αἱ βάρβαροι*, who were so unfortunate or so inferior, as to inhabit other Countries than their own. One of the greatest of their Philosophers, who carried the reach of human intellect as high as it well could go, asserted that Strangers were Slaves by nature; might be considered as beasts of chase, and fairly hunted down; and another in conformity with this, gives it as the opinion of his Ancestors, that of all wars, those are most necessary and just, which are made by Men against wild beasts; and next to them, those which are made by the Greeks against Strangers; “who,” says he, “are natural-

(b) The right of Postliminium is that by which any Citizen of one State, taken in War by another, and released from captivity, re-enters the *Threshold* of his Country and succeeds to the enjoyment of every thing which he would have enjoyed, had he never been absent. The genius of this Roman Law therefore considers all Mankind, whom they had not made their Friends by *Treaty*, as a kind of Enemies; who though they do not openly attack them, are perpetually lying in wait for them at home.

(c) *Hostis apud Antiquos, Peregrinus dicebatur.*

Pomp. Festus.

So also Cicero—“*Hostis enim apud majores nostros is dicebatur, quem nunc Peregrinum dicimus. Inducant duodecim Tabulæ, Aut Status dies cum hoste. Itemque, Adversus Hostem æterna auctoritas.*”

De Offic. L. 1. Chap. 12.

“ly

“ by our Enemies, and for whom we are perpetually  
“ laying snares.” (*d*)

These opinions may serve to explain several of their transactions which have been deservedly considered as disgraceful to them; and among the rest, the shameful treatment of the Ambassadors of *Darius*, by the two most renowned of their Republics, which has been thought by some to have been the mere effect of the turbulent spirit of the Athenian Democracy and a direct violation of the Law of Nations. (*e*) Possibly however, it was not so much an infraction of Law, as a compliance with the prejudices above mentioned, which taught them another sort of system to be observed towards Strangers. (*f*)

In the earlier ages of their history, the profession of Piracy was so far from being held dishonourable, that it was publicly avowed; and so late as the time of *TARQUIN* at Rome; above four hundred years after the age of *Lycurgus*, and cotemporary with *Solon* and *Pisistratus*, (when the Athenians are said to have had both Tragedy and Comedy among them, and Greece might therefore be thought to have assumed a more civilized form;) the *Phœceans*, on account of the sterility of their soil were forced to exercise Piracy, a profession which according to the historian was *in those times held honourable*, (*g*)

(*d*) *Aristot. Polit. L. 1. C. 3. & Isocrat. Orat. Panathen.* See *Grotius' Remarks. D. J. B. & P. 2. 20. 40. 3.*

(*e*) *Rollin. Hist. Anc.*

(*f*) It is remarkable that *XERXES*, Barbarian as he was, shewed he understood the Laws of humanity better than the Spartans themselves. That people conceiving themselves under the indignation of *Talthybius* for their treatment of a Character so sacred as that of an Ambassador: delivered up two of their Citizens as an expiatory Sacrifice to the Successor of the Persian Monarch; who, out of magnanimity, says *Herodotus*, declined following the bad example of the Spartans.—*Herod. L. 7. C. 136.*

(*g*) *Plerumque etiam latrociniis maris, quod illis temporibus, (Tarquinii Regis) gloria habebatur, vitam tolerabant.* — *Just. Hist. L. 43. C. 3. N. 5.*



But whatever might be their opinions respecting the rights of Strangers, their customs with respect to one another were hardly less ferocious. The cruelty of their Laws of War is well known; and instances of it might be multiplied upon one another, which would fill the more humane European of modern times with horror. The Slaughter of Prisoners in cold blood; the execution of Generals after unfortunate warfare; (a humbled State which commands the lenity and compassion of Christian Enemies;) the hardships of perpetual Slavery; the absolute annihilation of Cities; the wanton punishment of Hostages; the bloody personal revenge often taken upon Enemies, only for having performed their duty well; —these are the points most eminent in the history of their public intercourse together.

Examples of this, have already often been selected by others; nor is it necessary for those acquainted with the Grecian story to enumerate them. It will not however be improper to bring to their recollection, the strange inconsistency of character in the Athenians, who were reckoned the most polished people of Greece, which marked them in the course of their wars. When about to attack *Scione*, *Amphipolis*, and *Mytelene*, they *pass a vote* to destroy all the inhabitants of the former place who were above the age of puberty; in the two latter, all, without exception.

During the course of the Peloponnesian war, the Spartans and Corinthians having sent an Embassy through Thrace into Persia; the son of the Thracian King was prevailed upon to seize the Ambassadors and deliver them to the Athenians. These unfortunate men, clothed with a character universally and uniformly held sacred, by the most ignorant Nations, were put to death without trial, by a Decree of a People esteemed the most enlightened of their time. (h)

(h) Thucyd. I. i. c. 67.



It is wonderful to observe such a people in the same war, calmly voting in full assembly those acts of inhumanity which so much disgrace them. Had they been committed in hot blood, or with arms in their hands, much might be said for them; but in general, when a place which had stood a siege, was unhappy enough to be reduced to surrender; the ferocious populace were formally summoned in Athens itself, to dispose of their Captives; and the unhappy men commonly became victims to the avowed maxims of their Law.

In this manner it was that the *Æginetans*, brought in captivity from *Thyræa* in *Laconia* to Athens, were all of them executed in cool blood. Nor, as might be expected, did they here, or in a variety of other instances, do any thing not warranted by the example of their enemies. The Spartans at the surrender of *Plataea*, pursued the same bloody maxims, and revenged themselves after the battle of *Ægos Potamos*, by executions equally as barbarous and unjustifiable, as those ordered by their inhuman rivals. Through the whole progress of the war, indeed, the same spirit is to be discovered; and wherever the Merchant Ships of Enemies or even neutral Powers were met with, the usual mode was to put the crews to death.

Slavery was universally allowed among them, and a more disgusting picture than that which it presents to us, is scarcely to be met with.

The circumstances indeed which attended the *Lacedæmonian* Slavery, are shocking beyond conception; nor of all the examples of cruelty and wickedness, which stain and disgrace the annals of mankind, can any thing be found more horrid, or more revolting to nature than the *νεφέλαια*, or secret Law of the Spartans. By this, when the *Helotæ* or Slaves, became so numerous as to give umbrage to their Masters, it was allowable to thin them by death, and that

that in a manner the most miserable, on account of the apprehension of it in which they must always have lived. Some of the ablest of the young Men were dispatched privately into the country, armed with daggers and taking with them a little necessary provision. These, in the day time, hid themselves in the Thickets and Clefts, and in the night issued out into the highways, and murdered all the Helots they could light upon. Sometimes however they set upon them in the day, while at work in the fields, and thus in the very act of procuring provision for their Masters. (i)

Such barbarous actions however, though they may give a shock to our compassion do not move our wonder or indignation, so much as those deliberate violations of reasonable and natural justice, which we might have expected any where but in that country which, from the number and eminence of its philosophers, ought to have been nicely accurate in it's maxims concerning right. "It appears," says a modern author, who has ably delineated their policy and history, "to have been very generally held among the Greeks of that age, that Men were bound by no duties to each other *without some express Compact.*" The property of Foreigners might be any where seized, and themselves condemned to slavery. or even put to death without any breach of human Law; and so far from any breach of divine Law, that prayers were addressed to the Gods for favour and assistance in the commission of such violences.

Those connected with them by social compact they described by a term peculiar to themselves, **ENSPONDI**; meaning originally, persons with whom they had poured wine to the Gods, as a proof of their Compact. Those who had forfeited their claim to the benefit of this sort of alliance, were called

(i) Potter's Antiq. i. 619.

ECSPONDI, that is, *Out of Compact*, or Out-laws. Upon the surrender of Platœa to the Spartans, the Commissioners of the latter determined that their prisoners were ECSPONDI; they were asked one by one, whether in the present war they had done service to the Lacedæmonians; and answering in the negative, they were severally led aside and put to death to the number of two hundred Platœans and twenty-five Athenians. (*k*)

We may here observe a remarkable similarity between this mode of proceeding and that of the Commissioners of the French Convention, towards those of their own Nation taken in war, whom they condemn (and in this they are not inconsistent) as guilty of Treason. In such transactions therefore, the Greek Law of Nations considered the Subjects of one State in open hostility with another, in the same point of view, as modern Nations consider those that are guilty of *Treason*; which, as there was no allegiance due, was the summit of Injustice.

So much then for the Greek Law of Nations; we will now turn to the Romans, who, it must be confessed, present to us a picture somewhat more regular.

Many of their Institutions, as well as many facts of their History, prove to us that they went far beyond their rivals, in this Science. Nor can it be said that they improved upon the Grecian Law, so much as they had an original one of their own, superior to the other in regularity and equity.

So early as in the hundred and fourteenth year of their State, when ANCUS MARTIUS is said to have begun his reign; a Ceremony was instituted among them which would do honour to the wisest and most polished of the modern Nations; I mean their famous mode of declaring War. That Prince is de-

(*k*) Mitford's Hist. of Greece, C. 15. S. 7.



scribed by Livy as of a genius between that of Romulus, and Numa ; and as the latter softened the rugged minds of his new People by the Ceremonies of Religion ; So Martius wished to temper their Valour with justice, by the institution of Ceremonies in War. Whenever therefore the State had cause of complaint against another, a Herald, called the *PATER PATRATUS*, or Chief of the College of Herald, was first sent to the frontiers of the offending Nation to demand redress ; and if within thirty-three days, justice was not done, then, and not till then, they were to be considered as Enemies and pursued with fire and sword. Notice of this even was, after all, to be given, by the return of the same Herald to the Frontiers and casting a Javelin into the hostile Territory. (*l*)

So much generosity in an infant and precarious Nation, promised many interesting and magnanimous actions in the course of their History afterwards ; and accordingly, without meaning to go into the comparison of their examples of patriotism with those of Greece, we shall not be far wrong in saying that they exhibit much greater instances of regular Law, in their intercourse with foreign Nations. These are for the most part so well known, that it would be unnecessary as well as tedious to dwell on them ; many of them however ought on this occasion to be set forth, as it proves them to have had very strong and superior ideas, of the duties which Nations owe to one another. Some of them indeed will for ever form the basis of many modern questions ; As the transaction of *Posthumus* with the *Samnites*, the celebrated epoch of the *Caudine Forks*. The disavowal of this General's conduct by the Senate ; their offer to send him back ; the refusal of the *Samnites*, and the consequent arguments on both sides, (*m*) furnish

(*l*) Tit. Liv. L. 1. C. 32.

(*m*) Vid. Cicer. de Offic. L. 1. C. 11.



the matter for the very interesting and important part of modern Jurisprudence, called the *SPONSIO*, about which there are still various opinions. (*n*)

Their notions also of military Law, in regard to foreigners, went in some respects as far as our modern refinements. There are, says Cicero, certain duties to be complied with even towards those who have injured you; and in punishing, and avenging, there is a particular mode to be observed, which gives rise to the Laws of War. (*o*)

Amongst these Laws it seemed to be laid down, that no Roman could fight even for his country without a commission, which in all respects is similar to the modern notions, that those who so fight may be punished as Robbers. (*p*)

In compliance with this therefore, when the younger *Cato* was dismissed by *Pompilius* from his Province, with the rest of the officers of his Legion, and wished to remain behind for the rest of the Campaign; his Father wrote to *Pompilius*, desiring him to administer the military Oath to his Son, *de novo*; as the legion in which he had served was no longer under his command.

The letter also to his Son, lays it down that it was contrary to Law for one *not a Soldier* to fight with an Enemy. (*q*)

The spirit of the rest of their Laws of War, was generally of the same regular cast; we ought not, says CAMILLUS, (at a time when their civilization was comparatively backward) to aspire so much at victory, as to endeavour to avoid the infamy of obtaining it by base means; (*r*) and one of their earliest

(*n*) See Vattel. 2. 14. 209. (*o*) Cicer. de Offic. L. 1. C. 11.

(*p*) Vattel, D. des G. L. 3. S. 226.

(*q*) Negat enim jus esse, qui miles non sit, pugnare cum hoste.

—Ib.

(*r*) Plutarch, Vit. Camill.

maxims was, that they should wage war with not more valour than justice. (s)

It was a compliance with these principles that gave birth to many of their most virtuous, if not their most brilliant actions: that *Clelia* was sent back to *Porfenna*; that *Regulus* returned to *Carthage*; and those who treated of an exchange of prisoners after the battle of *Cannæ*, to *Hannibal*; that *Fabricius* refused to assassinate *Pyrrhus*; and *Camillus*, to receive the children of the *Falisci*.

A sense also of the necessity of enforcing such doctrine upon others, produced from them many severities toward foreign Nations; and the utter destruction of one of the noblest Cities of GREECE was professedly the consequence of her having infringed the rights of Ambassadors.

These rights themselves formed one of the most remarkable features of their Law, and are deservedly celebrated as being better understood by them than by any of the antient Nations. Indeed the very existence among them of a *College of Herald*s, to preside over and expound rules, expressly drawn up for their conduct toward foreigners, bespeaks them a People far advanced in the Law of Nations considered as a science.

With all their superiority however, they gave into the rugged notions which the want of a milder religion, and consequently a more equitable system of morality, made them imagine nothing more than just; and though they possessed magnanimity beyond most others, yet they were generally cruel, and in many respects ungenerous.

Of this, the whole plan and scheme of their TRIUMPHS are an example. To depress an enemy in his spirit and pride of mind, (the only consolation he has

(s) *Iustique ea, non minus quam forte didicimus genere.* — Liv. L. 5. C. 27.

left, when his strength and his power are annihilated;) To debase and mock his condition because we fear it no longer; To exhibit him to a gazing, ferocious, and sometimes, despicable multitude; an example of the uncertainty of fate, or perhaps (what is infinitely worse for his own feelings) of misconduct, and personal imbecility; is surely to add insult to injury, and to sharpen unnecessarily the stings of misfortune. Yet to do this, was the highest ambition, and almost the highest reward of a Roman General. The captives of his arm were led a miserable instance of fallen grandeur, behind his Chariot Wheels; and the higher their rank, their power, or their character, the greater the triumph of their inexorable Conqueror. Death itself by the Executioner in prison, was even sometimes the closing scene of this inhuman spectacle; a punishment which after such humiliations, was rendered surely less than ever necessary, either as a matter of policy or revenge. (t) The utmost ravage and bloodiest conduct in open and doubtful war, is perhaps more supportable than such a system. (u)

Nor

(t) The following animated passage from the Speech of Vibius Virius against the Romans, will sufficiently prove to us the savage inhumanity of their proceedings towards prisoners. "Cru-  
" ciatus contumeliasque quas sperat hostis, dum liber, dum mei  
" potens sum, effugere morte, præterquam honesta, etiam leni,  
" possum. Non videbo APP. CLAUDIUM & Q. FULVIUM vic-  
" toria insclementi subnixos; neque victus per Urbem Romam, tri-  
" umphi spectaculum trahar, ut deinde in carcere, aut ad palum  
" deligatus, lacerato virgis tergo, cervicem securi Romanæ Subji-  
" ciam.

Liv. L. 26. C. 13.

(u) See PLUTARCH's account of the Triumph of Paulus Œmi-  
lius. After the greatest display of acquired riches, there came,  
says he, the king's Children led captives, and with them a train  
of Nurses, Masters, and Governors, who all wept and stretched  
forth their hands to the Spectators, and taught the little infants to  
beg, and intreat their compassion. After these came Persius him-  
self,



Not were they less free from reproach, when sharpness of mind, rather than strength of arm, was necessary for their interest; when, for example they came to negotiate, to make, and to interpret Treaties. They here exhibit instances of chicanery, any thing but consistent with that magnanimity and force of soul, which were peculiar to them on other occasions. Of this, nearly the whole of the third Punic War, particularly their last transaction with Carthage; and the quibble of *QUINT. FABIVS LABEO*, to destroy the Fleet of Antiochus, are memorable examples. (v)

The whole course of their history indeed, marks them a people determined to pursue their own great object, of dominion, by every mode, generous or subtle. They were as crooked in the cabinet, as they were energetic in the field; and the conduct of the Senate for ages together, has been celebrated as a masterpiece in politics, in a sense even *Machiavelian*,

I do not mean to say that the instances which may be selected from their history, of bad faith, and improper interference in the affairs of other Nations; of open violation of the rights of neutral powers; and of public plunder and robbery which every where characterize them, (w) were not often blamed by their own writers, or may not be equalled by the conduct of very modern and enlightened Nations. But in the latter case, whatever may be the effect of pow-

self, clad all in black. He looked like one altogether astonished and deprived of reason through the greatness of his misfortunes.

Plut. in Vit. P. Cæmil.

Perseus afterwards destroyed himself in prison.

(v) Antiochus being defeated by that General, agreed to give up to him one half of his Fleet. The manner in which the Roman executed the Treaty, was by cutting every Galley in halves, and thus depriving him of the whole.

Valer. Max. L. 7. C. 3.

(w) See the Comments of Montesquieu upon these parts of their History. — Grand and Decadence des Rom.



er in commanding submission, it is always well known when the Law of Nations is broken; cotemporary States are appealed to, and the cause is tried, in argument at least, by known principles and settled rules. Of this mode of proceeding the Antients, either knew nothing, or did not make use of it; which warrants a fair inference, that what was thus done, was not considered as an infraction of law. It is the more warrantable, because of all the nations of the world, none ever paid a more religious, or indeed superstitious deference, than the Romans, to the force of promises and oaths; a point of their character which stands foremost in the numerous and able critical disquisitions, to which the actions of this wonderful people have so often given birth.

But whatever was their inhumanity, or the bad faith of their government towards foreign princes, in their progress to dominion; their conduct towards the bulk of the people they conquered, was for the most part exemplary, and far different from that which we have noticed of the Grecians. To civilize by conquest; to melt down and incorporate the subdued Nations with their own, and derive assistance from them, as from their fellow Citizens, in future attempts against others; was a great part of their policy. But to act thus, was directly contrary to that revengeful and bloody spirit which distinguished the Grecian Politics. And accordingly we find, that after having punished, or got rid of the CHIEFS of the Nations they subdued, the people for the most part were left in the enjoyment of their religion and customs, much of their property, and often of their very Government itself. (x)

This

(x) I am aware of many instances of severity towards prisoners, which may seem to militate against this position; particularly that of the Teutonic women, who, upon the defeat of their husbands by Marius, sent a deputation to that General, to stipulate for

This principle of action, possibly took its rise from the accidental conduct which they were obliged to pursue on the first foundation of their State. A handful of people brought together on the hazard; without connection, almost without territory, and absolutely without wives; could not pursue those inexorable maxims which regular and long established States fell into. At least they could not expect to be rapid in their augmentation, except by the very mode which the policy of Romulus dictated; and once begun, they might continue it from habit alone, if not convinced by experience of its superior benefit.

This however has been differently accounted for by a writer of research and learning of the present time.

In considering the various effects upon the Law of Nations which are produced by different modes of life, Dr. *Falconer* refers this variation between the Greek and Roman Law, to the manner of living in the two countries. In the *Savage* and the *Shepherd* States, says he, much land is necessary for the maintenance of the people; and when one People is conquered by another, the desire of encreasing their quantity of food by the accession of their territory, makes the Conquerors thin the inhabitants by military execution. On the other hand, where agriculture prevails, as much less land is necessary, there is no reason why the prisoners should not enjoy their lives, when there is enough for their support. It was not then extraordinary, that the Romans whose agricul-

for the security of their chastity and freedom, but were refused, and voluntarily inflicted death upon themselves and children.—  
Flor. L. 3. C. 3.—But it must be remembered that this related only to an Army which had just fought, not to a people conquered. These Teutones had no country; they were in quest of one; and there was therefore no reason of policy, why they should not comply with the maxims of the time, which, with respect to the slavery of prisoners, were the same among the Romans as among the Greeks.

ture could maintain additional numbers, should receive their prisoners into their Society; while the Greeks who in several respects were in a situation similar to the people formerly described, (*those in a savage and shepherd State*) fell naturally into more ferocious maxims.

He goes on to prove this latter position, by the number of Colonies which Greece so often sent forth; a sure mark that there was not enough for their maintenance at home. (y)

Now I own this reasoning appears by no means so strong as to produce conviction. For in the first place, *Commerce* as well as *Agriculture* will produce food, if not in as great a degree in very rich soils, yet in a much greater one, in soils comparatively barren, and if the ROMANS were Husbandmen, they despised commerce. The GREEKS (particularly the ATHENIANS and CORINTHIANS) not only did not despise *agriculture*, but rose to great eminence in *commerce*. Many of their ancestors came from PHOENICIA and from EGYPT; and the commercial spirit of the one, and the agricultural spirit of the other, would in their new settlements find ample room for the exercise of both. For while the great length of their Coast, their numerous Harbours, and the multitude of Rivers, with which their whole Country was intersected, held out the greatest incitements to Trade; the fertility of a number of their provinces, equally incited them to a vigorous cultivation.

The face of the country has been accurately delineated by their own writers, and their accounts have been well collated by modern critics—and though ARCADIA, DORIS, ÆTOLIA, and ATTICA, are described as extremely mountainous; yet the latter is said to have been fertile in Olives and Figs; and the

(y) Falconer on Climate, B. 6. C. 3.



vales of THESSALY, BOEOTIA, LOCRI and PHOCIS, and particularly ARGOS and MESSENIA, were fruitful in corn to a degree of celebrity.

With respect to the colonies sent out by the GREEKANS, the argument, does not perhaps apply so much to them as to the ROMANS themselves, whose colonies were a well known political instrument for subjugating foreign Nations, and extended far and wide.

But the reason against this opinion which, it should seem, ought naturally to have most weight, is drawn from the high state of perfection to which the Greeks attained in all the refinements of Art and Science; and which even, while they were forced to crouch under the sword of their rivals, rendered them still superior not only to their conquerors, but to all the world.

Such refinement however is totally inconsistent with the savage, or shepherd states; for men do not commonly attain, even to a moderate degree of merit in the Arts, till leisure has been afforded for the division of professions and of labour, by the ease and certainty by which subsistence may be acquired.

We pretend not however to account, farther than we have done, for this marked difference between the Greek and Roman Law of Nations;—contenting ourselves with observing the fact, as a strong corroborative proof of our point, that the Law in question, is only that which obtains among a particular *Class* or number of States. The Towns of Italy and of Greece lie nearly in the same latitudes: between Brundisium and the Acro Ceraunian Promontory, there is not more than one degree of longitude; and between Rome and the Ionian Nations, (nearly the extreme points of the two classes of People) not quite sixteen degrees; the ages of their Republics were almost the same; the time at least when the  
Roman



Roman maxims were most inculcated, and the improved state of Greece, were absolutely cotemporary, (2) and in their religion any essential variation is not easily discovered; yet so marked, and so deep is the line of difference, which we find in their Laws of Nations.

Such then was the character of the Law among these two remarkable SETS of PEOPLE, till the one was incorporated with the other by conquest, and both together yielded at last to a destiny, which for a long time covered the whole European World with misery, and darkness.

(2) There were not forty years between Alcibiades and Camillus.

## CHAP. VII.

THE PRINCIPLE OF THE SCANDINAVIAN LAW OF  
NATIONS.

IN that unfortunate period, when the populous North poured forth her multitudes to overwhelm the far famed Mistress of the World ; when every thing that was elegant, and every thing that was wise, gave way to the rugged ignorance, and destructive fury of our Scythian Ancestors ; the Laws of all kinds as well as the discipline of the Romans were lost amid the general uproar. The Scandinavian swarms, consumed, or swept off, every thing that came in contact with them ; the old Nations melted away ; no vestige of former civilization was left, and the little humanity or order that had been cultivated, fled from before a people who despised, or never had been acquainted with them. A new *Set of Nations* therefore got possession of the World ; and a change in notions and manners ; a different language, and a different Religion, were introduced.

These new Masters of EUROPE were of the most rugged cast ; they delighted wholly in blood ; war was their pastime, and slaughter their feast ; and these manners, generated perhaps at first by the climate, were confirmed by their Religion. (a)

(a) See a full account of their Characters and Institutions in Cæsar and Tacitus ; Pelloutier. Hist. des Celtes. Mallet's North. Antiquities. Temple on Heroic Virtue. Bartolin. de caus. contempt. Mort. Gibbon's Account of the Scythians ; Decl. and Fall. ch. 26. and the elaborate Notes of Robertson. Introduction. to ch. 5.

The present Nations of Europe are said to spring from two classes of people; the CELTIC and the SARMATIAN; in their race very different, and in their religious notions by no means the same. The first gave origin to the Gauls and Britons; the last to the Scandinavians or Goths. The former of these, as is well known, were taught certain mysteries by the DRUIDS which are now impenetrable from the loss of the documents that contained them; (b) the latter were absolute Polytheists, which may be gathered from various monuments that remain. (c) In those points however which could at all influence their public characters, or the system on which they proceeded towards other nations, there was a terrible similarity between them. Both of them believed in the immortality of the soul, taught to the one by the Druids; to the other by ZAMOLXIS; and both endeavoured to deserve Elysium in a manner equally horrid to themselves and dangerous to their neighbours; since they concurred in imagining that violent death was the only passage to Paradise.

It is wonderful under this influence to what a height they carried their contempt of life; inasmuch that death, and that, in its most violent form, seemed to be an object of their courtship, and he who died of old age was covered with infamy. To die with his arms in his hands, was the vow of every free man, and the pleasing idea they had of this kind of death, led them naturally to dread the thought of perishing by disease or old age. Hence

(a) The British Druids taught their mysteries in verses which their followers were sometimes twenty years in learning. *Cæsar de Bell. Gall. C. 13* These are entirely lost.

(b) They are very authentic, and were brought together into collections called the *Edda*, by SÆMUND SIGFUSSON, born in the year 1065, and SIGURD, Judge of Iceland, in 1225. (See the *Introductio* p. 21, 22. Pref.)

in their legends and poems, the warriors as they fell in the field, are reported to die singing or laughing; (*d*) and hence when by accident, (which more polished men would call lucky, but which they deemed a misfortune,) any of them advanced in safety to years, in spite of the perils of war, the custom was to destroy themselves, either by their own hands, or by being carried into a field of battle, or by having recourse to the kindness of their friends to perform this acceptable service for them. (*e*)

Sometimes they threw themselves down precipices into the Sea; and in Sir William Temple's time, there was still in Sweden a place called ODIN'S HALL, the name of which was preserved as a memorial of this ferocious custom. It was a great bay in the Sea, encompassed with steep and rugged rocks; and they hoped by the boldness of such a violent death, to renew their pretence to an admission into the hall of their founder and supreme God, which they had lost

(*d*) King Renger, who died singing the pleasure of death in a field of battle, cries out at the end of a Stanza, "The hours of my life are passed away, I shall die *laughing*." The conclusion of Eulogy of a king of Norway is, "Hereafter it shall be recorded in history that king HALFER died *laughing*;" and in praise of a man who died in single combat, as recorded by Saxo Grammaticus, it is said that he *feel, laughed, and died*.—North. Antiq. i. 207.

(*e*) Northern Antiquities, i. 200.

There are in the same book, several curious instances of this contempt of the pains of death. A young warrior of Jomf-bourg, in Pomerania, having been made prisoner, and led to execution after the custom of the time, begged that he might not be led to punishment like a sheep, "Strike the blow said he to his executioner in my face, I will sit still without shrinking, and take notice whether I once wink my eyes, or betray one sign of fear in my countenance."

Another warrior having been thrown upon his back in wrestling with an enemy, and the conqueror being without arms to dispatch him, the vanquished man promised to wait quietly in that posture, till the other went for a sword to kill him, and he faithfully kept his word. Id. i. 205, 207.

by



by failing to die in combat, and with their arms.

(f)

There was however this difference between the notions of paradise among the two people; that the CELTS imagined those who died of natural deaths, were merely *deprived* of happiness; while the SCANDINAVIANS *punished* them "in caves under ground, all dark and miry, full of noisome creatures, of stench and misery. (g) The enjoyments of the one were also more mild than the other; the CELTS passing to what they called FLATH INNIS, or the Noble Island, which is described as green and flourishing: (h) The Goths to the palace of ODIN, who to use Sir William Temple's expressions, eternally kept open house for all such Guests, where they were entertained at infinite tables, in perpetual feasts and mirth, carousing, every man, in bowls made of the skulls of enemies. (i) The modes of worship among both races were however, horrible to the last degree. The Druids sacrificed prisoners of war by hundreds, by placing them in gigantic idols made of wicker, and burning them to ashes. The inhabitants of *Cocerland* are said to have been a cruel race, whom all others avoided, "propter nimium Idolatriæ cultum; (k) and those of *Estland* to have been worshippers of Dragons and Birds of prey, to whom they offered up living men, bought of the merchants, and were particularly nice in chusing out those of peculiar beauty. (l)

Hence

(f) It was related to Temple, by Count Oxenstiern, the first of the Swedish Ambassadors at Nemeguen. See Temple's *Miscellanea*, Part 2. Ess. 3. on Heroic Virtue, and *North. Antiq.* 1. 210.

(g) Temple on Heroic virtue.

(h) Macpherson's *Introd. to Hist. of G. Britain*.

(i) Temple on Heroic Virtue.

(k) Adam. Brem. de situ Dan. 12.

(l) Nam et ipsi Deum christianorum prorsus ignorant. Dragones adorant cum volucribus, quibus etiam vivos litant homines, quos

Hence then it appears that it was a point of their very *Religion*, to become familiar with slaughter; and it was not merely their disposition, but their bounden duty, to spread about them far and wide, what Christianity teaches us to consider as the most afflicting of evils. The Heroes, says the Edda, have every day the pleasure of arming themselves and cutting one another in pieces, but as soon as the hour of repast approaches, they return on horseback, all safe and sound. (*m*) In this frightful Mythology also, their God ODIN, is called “The terrible  
“and severe God; the father of slaughter; the  
“God that carrieth desolation and fire; the active  
“and roaring Deity; he who giveth victory, and re-  
“viveth courage in the conflict; who nameth those  
“that are to be slain.” (*n*)

It will be not less agreeable than curious to observe, as we shall do in the course of this work, how the horrors of these customs came to be lost, amid the altered manners of Europe; and how the very language of nations when they spoke to one another in their Treaties and public instruments, was expressive of a spirit the most mild and the most opposite to what has been recorded.

Upon the whole then it follows plainly, that with such maxims and morals, not only the municipal customs, such as they might be, but the Law of Nations of the Northern people, must have been far different from that comparatively regular one of the Romans, of which we have been recounting the particulars. Their rules of Right, indeed, far from checking their dreadful and murderous inclinations, were themselves so warped and adapted to them,

quos a mercatoribus emunt; diligenter omnino probatos ne maculam in corpore habeant, pro qua resistari dicuntur a draconibus. Id. 13.

(*m*) North. Antiq. 1. 120.

(*n*) Id. Ib. 1. 86, 87.

that

that they gave them fresh force. They looked upon war, says M. Mallet, as a real act of justice, and esteemed strength as an incontestible title over the weak ; as a visible mark that God had intended to subject them to the strong. They had no doubt but that it was the will of the divinity to establish the same kind of dependance in this respect, as among other animals ; and setting out from the principle of the *inequality* of mankind, as modern Civilians proceeded from the principle of their *equality* ; they inferred that men had no right to what they could not defend, and this maxim therefore formed the basis of their law of nations. (o) Accordingly, they made open war upon all the order and regularity that were known ; and within a very few years after the first irruption, of this bloody race, a complete revolution in Law, as well as in every thing else, took place throughout Europe. The Roman people, language, and manners, past wholly away ; and with them past away the Roman Law.

From this time therefore we must begin as it were anew ; and considering the world again in its infancy, or if you will, in a savage *state* of *Nature* ; we must watch its progress once more from ferocity to civilization ; until from the most lawless habits, we perceive it, under the influence of a milder *Religion*, together with various local circumstances, advancing in this part of Jurisprudence, to comparative perfection.

(o) North. Antiq. i. 200.

CHAP.

## C H A P. VIII.

THE HISTORY OF THE LAW OF NATIONS IN EUROPE, FROM THE FALL OF THE ROMAN EMPIRE TO THE ELEVENTH CENTURY.

THE peaceful and well protected Inhabitant of a modern *European* State, will shudder at the picture which is now about to be set before him. More particularly the happy native of Britain, will have reason to rejoice that he lives in different times, and from the fortunate situation of his soil, removed from such horrors of war, as we are about to record, should the world be so unfortunate as to see them revive. The law which we are now going to contemplate is nothing but a chain of the most cruel maxims; and as all ideas of principles or science, seems to have been banished, or rather never to have been entertained; to shew what were the precedents which the Law supplied, will be merely to recount a series of bloody and savage customs.

THEODOSIUS may be said to have been the last of the Emperors, who swayed the Roman Sceptre in its full power and lustre. The division of his mighty domain into two Empires under his immediate Successors; if it was not the cause, was at least the signal for the torrent of Barbarians to burst from their mounds which broke down the whole force of the Roman power, and separated the world into new States. (a)

(a) — Scanzianorum in reliquas mundi partes expeditiones, et quasi inundationes, &c.—And Bur. Suec. Descrip. 2.



In the very beginning of the reign of *ARCADIUS* and *HONORIUS*, we find the repeated attempts of the Barbarians growing effectual; and long before the middle of the fifth century, we may observe the foundation of the modern kingdoms of Europe, among the provinces desolated by the different tribes of *Goths*, *Vandals*, *Burgundians*, and *Franks*.

Eighty years sufficed to destroy even the name of the Western Empire, and to reduce the remnant of its power to the mere kingdom of Italy, under the Herulian Chief. (b) A century more brought down upon these devoted people; the *Huns*, the *Avars*, and the *Saxons*, in order to complete the ruin which others had begun.

The laws of war of those terrible Conquerors, may be known by their effects. The Romans were not merely subdued, but annihilated; their Cities did not simply pass from old, to new masters; but they were absolutely reduced to a confused heap of ruins. The slight sketch already given of the religion and manners of many of the parent nations, may in some measure account for these bloody maxims; and it must be owned that the descendants of *ODIN* were not unworthy their inexorable ancestor.

Whether from the principles of such a religion; the hatred they bore their Enemies; their love of booty; or the mere savageness of their dispositions; their course was every where marked with a deluge of blood; and extermination seemed so entirely their object, that they have been not improperly likened to wild Boars. (c) Gibbons compares the *Huns* of Attila, to the Moguls and Tartars, in their most savage state; and if the comparison be just, miserable indeed must have been the situation of mankind. Among the latter, the abuse of the rights of war

(b) *ODOACER* was the first *King* of Italy, in the Year 476.

(c) *Partim naturam populi suam prælio, et fugientem dissidia, instar aprum.*—And. Bur. Suec. des. 2.

was exercised with a regular form of discipline. Whenever a City was reduced to surrender at discretion, the inhabitants were assembled in some adjacent plain, and a division was made of them into three parts. The soldiers and young men were either enlisted among their Conquerors, or massacred on the spot: the young women were reserved for other purposes; and the old and infirm alone were allowed to live, paying a tax. (*d*)

This was the conduct, when no extraordinary rigour was shewn; but the most casual provocations; the slightest motive of caprice or convenience, involved the whole in an indiscriminate slaughter; and to use their own expressions, "Horses might run without stumbling, where houses and cities had once stood. (*e*) In conformity with these manners, we find their history, a history of blood. Above four millions of persons were said to have been slaughtered by TAMERLANE; ATTILA is esteemed his counterpart, and may therefore be held to have deserved the horrible appellation of the scourge of God, which the Scythian Savage was pleased to assume among his other titles. (*f*) But exclusive of the victims which fell before him; the waste made by the Barbarians was computed to amount to more than six millions of souls, during the thirty-two years alone which JUSTINIAN reigned; and instances might be multiplied upon instances, to shew that the cruelty of the detail was equal to, if it did not

(*d*) Vie de Gengiscan par La Croix passim.

(*e*) Gibbon, Dec. & Fall. ch. 34.

(*f*) Attila is thus described by the author of the *Respublica et Status Hungariæ*, p. 102. "Omniaque Cædibus atque incendiis miscens, tantum sui terrorem excitavit, ut vel ad nomen ejus, nod aliter quam furia ejusdam orco progressæ omnes Nationes contremiscerent." We may indeed judge of the slaughter of these wars, when 180,000 men are said to have perished on Attila's side alone, at the single battle of Tolosa.—Id. p. 103.

surpass the horrors which the gross sum must imply. In the siege of *Topirus*, the Slavonians massacred fifteen thousand male prisoners; others of their captives were impaled alive; or suspended between four posts, and beaten with clubs till they expired; or inclosed in buildings and left to perish by fire.—The *Thuringians*, after the defeat by *CELIUS* in the plains of *Chalons*, murdered their hostages as well as captives, and put to death two hundred young maidens, by tearing them asunder by wild horses, or crushing their limbs under rolling waggons: The *Avars*, after offering their captives to *MAURICE* at a low price, and being refused, deliberately cut their throats as useless merchandise. (g)

Such horrors gave rise to Fables that were less unnatural than they may appear to the enlightened minds of modern enquirers. The Witches of *SCYTHIA*, who for their foul and deadly practices had been driven from society, were said to have copulated in the desert with infernal Spirits; and the *HUNS* were the offspring of this execrable conjunction. The *LANGOBARDS* were supposed to have heads like those of Dogs, and to resemble those fierce animals, not only in slaughtering, but in drinking the blood of their enemies. (h) Whatever the belief was, the effect of their rage was confessedly terrible; insomuch that the finest and best peopled Provinces were rendered naked and barren; and Africa, which on account of its beauty and fertility, had been call-

(g) See Gibbon Dec. & Fall. chs. 35. 42.

(h) This is *Jornandes'* story. Others, according to the Author of the *Reipublica et Status Hungariæ*, derive them from the more classic origin of Fawns and Satyrs; others again from *MAGOG* the Son of *JAPHET*.—*Resp. et Stat. Hung.* p. 36.

Many of the Inhabitants of the Baltic Islands were supposed to have heads like dogs, and all males brought forth by the Amazons, were imagined invariably to be of this form.—*Adam. Brem. de situ Dan.* 15.



ed by a writer of the middle ages "*Speci. Italis totius  
"terræ florentis,"* (i) was reduced to a state almost  
fully like that of a desert, that according to the His-  
torians, one might travel several days in it without  
meeting a man.

Nations that could make war thus terribly, would  
never be delicate in their selection of a cause. It  
would be even doing them injustice to suppose that  
they stood in need of any. The SCANDINAVIAN  
and GERMAN People, the Parents of all the rest,  
were little accustomed to wait the slow returns of  
labour for subsistence, when they might acquire it  
by the sword? nor would they condescend to raise  
that by the sweat of their brow, which they could  
more easily obtain by wounds and blood. (k) It was  
usual therefore among them on the approach of  
the Spring, to assemble and deliberate into what  
quarter they should carry the war, as a thing of  
course. The hope of booty generally determined it;  
and it was only to be avoided by the payment of a  
tribute under the name of a present. Even before  
these tributes came to be regular, the withholding  
the presents of mere ceremony, gave rise to very  
cruel invasions. That under so firm a soldier as VA-  
LENTINIAN, by the Alemanni, arose from the indig-  
nity of their Chiefs at the parsimony of a Roman Mi-  
nister, who had lessened the value of the present they  
were intitled to receive, on the accession of a new  
Emperor to the throne. (l) That also the Arabs  
against the Soldiers of JULIAN, retreating from the  
Persian war, originated from the same cause. (m)

(i) Victor.

(k) *Nec arare terram aut expectare annum tam facile persuade-  
ris, quam vocare hostes et vulnera mereri: pigrum quinimo et in-  
ers videtur, sudore acquirere quod possis sanguine parare.*—Tacit.  
de Mor. Germ. 14.

(l) Ammian Marcell. 26. 5.

(m) See Montesquieu's *Reflections upon this sort of Law of  
Nations.* Grand. et Dec. ch. 18.



This precarious state of the public security, almost naturally implies a general want of good faith. Examples of it are but too numerous during this unfortunate period, but which as they may be considered as *infractions*, need not to be mentioned. It was reserved however for such a state of the Law of Nations, for a People making Treaties, *deliberately* to bind themselves by a *previous* oath, to *break* the faith they were swearing to observe. This was supposed to be the case with the Gothic Nations settled by THEODOSIUS in Thrace, when they bound themselves by treaty to defend that part of the Empire. (n)

In such a State also, the distinctions between municipal Jurisdiction, and the national power, as it concerned Foreign Governments, could hardly be well understood,—and accordingly we find when MARCOMIR, a King of the *Franks*, had broken a treaty he had made with the Romans; he was not punished by the order, and at the discretion of the Sovereign; (the only mode which could consistently be pursued :) but was calmly summoned before the Tribunal of a Magistrate, and convicted and sentenced, like a Subject who had broken his allegiance. (o)

The hope of booty being allowed among the fair causes for war; the custom of exacting *Tributes* naturally followed; for in this situation of continued and universal hostility, nations could never be aware of the points of attack; and when every man armed himself against his fellow as a matter of course, it surpassed human courage, and human foresight, to be always effectually upon their guard. Much firmer people therefore than the Romans, might not very

(n) See the quarrel of FRUVITTA and PRIGLE, in the presence of the Emperor THEODOSIUS, which against their will discovered to him their system of treachery.—Gibbon ch. 26.

(o) Gibbon, ch. 30.

naturally fall upon the expedient adopted by them and others, to deliver themselves from these cruel evils. The ease however with which Tributes were granted, as naturally provoked new demands and new barbarities;—Those exacted by the *Danes* and *Normans* are well known; and the cruel avarice of these merciless Robbers, (who were only complying with the received Law of Nations according to *them*,) has been pathetically described by various Historians. To give particular instances of their cruelty after those already cited, would be as unnecessary as they are disgusting; it is sufficient to observe, that in mere predatory expeditions, this ferocious people, who were only to be curbed by the commanding genius of CHARLEMAGNE, spread themselves after his death, over Saxony, and Flanders as far as Mentz;—and after ravaging the coasts, penetrated by the rivers into France; where they pillaged and burned her Capital, and the fairest of her Towns, as far as the province of Dauphiny.—CHARLEMAGNE foresaw and dreaded their progress, and is even said to have shed tears, when he found them defying his name, and likely to break down the force of that order, which he seemed born to establish. (p) It would be unnecessary to attend their progress into Britain where they made themselves masters of the Throne itself; or to describe the extent of their barbarities and robberies, which could only be got rid of by means equally destructive of regularity and law, a general massacre of them by the people they had outraged.

(p) See Velly. Hist. de France i. & Mallet Northern Antiquities, i, 245. et infr. there is a long and full account of them in Mezerai, & Guiccardini's Descript. of the Netherlands. 2<sup>o</sup> ann. 830, to 890. Even the stout William, in times far better regulated, was reduced to the humiliation of buying off the attacks of the Danes from his newly acquired kingdom.—Hoveden, p. 451.

Had these horrors been merely the effect of a burst of passion, or the heat of war; or considered as a direct infraction of Law; some consolation might be derived to the lover of good order. But it is his peculiar unhappiness to find that they were the mere effect of a compliance with *received* maxims, and a conformity with, what was conceived to be, no more than duty; for even independent of the convulsions produced by the irruptions of such butchers as ALARIE, ATILA and GENSERIE, the injustice of executions in cold blood seemed to be reduced to a system.

Of this nothing is a stronger proof than the common mode of proceeding against unsuccessful Generals when taken prisoners in battle. In those unfortunate cases, their deaths were regular and certain; and the horror is encreased when we consider that the custom prevailed long after *Christianity* was introduced, and may be traced through a series of years so connected and extensive, that we are not able to point out the exact time when it ceased. We have seen its reception among the *Greeks*, and *Romans*; nor could it be expected that men less enlightened than they, should exceed them in humanity. We accordingly find the Law in full force at various and distant periods.—In the year 366, upon the defeat of the Alemanni, their captive king was hung on a Gibbet by the Army of *Jovinus*.—In 406; *Radagaisus* monarch of the Goths reduced by *Stilicho* to lay down his arms, after being for some time a prisoner, was shamefully put to death. Fifty years afterwards, the great and just THEODORIE himself, orders for execution, *Rechiarus* the conquered king of the Suevi; In 486, *Syagrius* the Roman Commander in Gaul, was defeated, and beheaded by *Clotvis*; and in 532, the Burgundian *Sigismund*, overcome by the Sons of that Prince, was together with his wife and children buried alive in a deep well. Even the enlightened



lightened *Charlemagne*, who lived near three centuries after them, and whose genius has been justly said to have gone beyond his age ; is found calmly commanding four thousand five hundred Saxons to be beheaded in cool blood, after having slaughtered the bulk of their nation in various battles.

The Laws which could permit such deliberate executions, very naturally allowed as an act of mercy alone, what the more humane morality of modern times, has deservedly driven from its Code. We must not therefore be surprised to find personal SLAVERY existing throughout those Countries which admitted and brought into practice these maxims of blood ; and the greater the number or the rage of hostilities, the more fruitful was the source of servitude.

It was often made the instrument of political advantage as well as of private wealth : After the defeat of *Chsroes* by *Justinian* ; seventy thousand captives were led from the banks of the *Caspian*, to form the settlement of the Isle of *Cyprus*. The policy of *Charlemagne*, after an interval of above two hundred years, was of the same kind ; and the half-subdued Soldiers whose allegiance he doubted in *Saxony*, became the faithful means of his defence in the provinces of *Friseland*.

The state of a Slave in those times, was little better than it was under the Greek and Roman power. (q) The horrid institution of the *ΚΡΥΠΤΙΑ* was indeed not known ; but absolute power of life and death was claimed by the Master ; and the warrior who at one moment had defied his enemy in the field ; followed him the next, as subservient to his will, as the cattle which equally with himself, formed the estate of the Conqueror

(q) Among the *early* Germans however, according to Tacitus, it was better. *Melior Conditio apud Germanos quam Romanos.*  
— De Mor. Germ.



In process of time, distinct classes of Slaves came to be instituted. Those of talents or personal beauty, were reserved for the services of the family; those, whose only qualifications were health and bodily strength, were chained as it were to the soil, and sold along with it as the means of its cultivation. They were considered indeed as a personal as well as a real property; the English law, in common with most others, dividing them into Villains regardant, and villains in gross; the one fixed to the Soil (*adscripti glebæ*), the other annexed to the person of the lord; (r) and there are instances of great numbers of them being transported from one estate, and even from one province or kingdom, to another, (s) as will, or convenience directed.

To preserve an empire thus proudly administered, we must not be surprised to find that a difference, even in moral worth, was made by the Law between the Lord and the Villain. Hence, the deposition of a slave against his master in a Court of Justice, was never received; (t) hence also, that humiliating distinction which the Frankish Conquerors made between the equivalent demanded for the death of their relations when any of them were killed; and that paid for the death of the miserable Gauls. (u)

The

(r) Littel. Sec. 181. Sir T. Smith's Commonwealth 3. 10. Spelman's Gloss. voc. Servus. "Germanorum instar erant nostri Villani, a Servis multum diversi; quidam erant *prædiales*; quidam *personales*," &c.

(s) Chilperic sent away whole families of Slaves from his farms near Paris into pain; they were chained in waggons, a nuptial present on the marriage of his Daughter.

Greg. Tur. L. 6, C. 45.

(t) L. L. Sancti. Steph. Cap. 19. Resp. et Stat. Hung. p. 179. Edict. Theod. 48. ap. Iendenbrog. 249.

(u) See the Salic and Repuarian Laws with Montesquieu's reflection's; Esp. des Loix, and Observat. sur l'Hist. de Fr. par Mably. L. 1. Ch. 2. Also Gloss. de Du Cange, voce Servus, and

The existence of Slavery, was long protected in Europe. We saw it universal before the Christian æra; nor could it be expected that a new religion whose establishment was accomplished under a cruel length of persecution, and which looked for success to insinuation and conviction alone, should immediately effectuate the reforms which it came only to recommend. *Christianity* however, in conformity with its principles, claims the merit of having gone farthest towards the abolition of this debasing Institution. It is indeed the great, and almost the only cause of its abolition, in the opinion of GROTIUS, who lays it down that by the old Law of Nations, *the practice was perfectly legitimate*; (w) an opinion in which he is fully borne out by the universality of the usage, both before and for some time after the æra of Christ. (x)

When however the milder doctrines preached by him, came really to be well understood and disseminated in their genuine purity; the effect upon this part of the then received Law, was visible and permanent. The professed and assigned reasons for most of the charters of manumission, from the time of

and Cap. 19 of the *Leges Sancti Stephani*. Resp. et Stat. Hung. p. 103. It cannot be expected that in a work like this, our attention can be arrested to consider at large the condition of slavery in the middle ages; or if it could, the matter has already been too amply and too accurately investigated to attempt it anew. It is enough to touch slightly upon the subject, in order to shew that it came within the Law of Nations of these times. The learned reader need not be told of a whole cloud of Antiquaries and Critics upon this part of the Customs of Europe.

For the Condition of the Saxons, however, in *England*, see much learning in Dr. Brady's Gen. Pref. to his History, and Sir T. Smith. 3. 10.

(w) De Jur. B. et P. 3. 7. 9.

(x) The chief and most antient division of men in the Codes of Jurisprudence in Germany, was into two ranks; the Freemen and the Slaves.

Heineccius Elem. Jur. Germ. L. 1. S. 21.

GREGORY

GREGORY the Great, to the thirteenth Century, were the religious and pious considerations of the fraternity of men, the imitation of the example of CHRIST, the love of our Maker, and the hope of redemption. Enfranchisement was frequently given upon a death-bed, as the most acceptable service that could be offered, and when the sacred character of the priesthood came to obtain more universal veneration; to assume its functions was the immediate passport to freedom. (y)

Long before this however, *Christianity* had begun to perform its office in softening the rough manners of the Barbarians; and though, as was natural, the savage understanding of a Goth, or a Scythian, might not be able to comprehend, or might perhaps at first despise the humane duties which it taught; yet he was insensibly led to respect, and afterwards to embrace a religion, which evidently tended to hold out protection to the unfortunate. *Alaric* in the midst of the sack and pillage of the richest City in the World, gave the strictest orders to respect the Churches of the Apostles; and what is more wonderful at that time, to spare the lives of the *unresisting* citizens. *Alaric* and many of his Goths, were *Christians*; and in compliance with his commands, (or probably in the fervour of his own zeal,) one of his Captains in the moment of laying his hands on an immense hoard of plate, upon hearing that it was dedicated to the service of *Saint Peter*, abstained from his prey, and was immediately ordered by his Commander to replace it in the church.

(y) The enfranchisement of Slaves in England arose most particularly from these principles of piety: The manner of it has been well described by Sir Thomas Smith (*Commonwealth*, 3. 10.) and Dr. Brady (*Gen. Pref. to his Hist.*)

For the manner and motives of enfranchisement on the Continent, besides Montesqu. Du Cange, &c. see particularly Heineccius *Elem. Jur. Germ.* I. 1. Tit. 2. De Stat. Libertinorum, and the elaborate Note U of Robertson, Ch. V. Introd. S. 1.

On

On a similar occasion, and in a moment of equal license, *Luitprand*, king of the Lombards, on the point of plundering the same devoted City; listened to the voice of the Pope; withdrew his Troops, and performing his devotions at the shrine of the Apostle, respectfully made an offering of the ensigns of his command. (z)

A sacrifice much more congenial with the genius of the new religion, was made by *Heraclius*. After the defeat of *Chosroes*, fifty thousand captives were released by that monarch, consistent with the spirit which to use his own words, made him devote his life *for the salvation of his brethren, to obtain in a crown of martyrdom, an immortal reward*. The dawning of the *Christian Law* of Nations is also to be observed in the conduct of the same Prince, in his messages to the Persian Tyrant, exhorting him to spare the blood of his Subjects and relieve an humane Conqueror from the pain of destroying the fairest countries of Asia. (a)

Such among many, were the good effects of *Christianity* upon the Laws of War during these times—Not that it is meant to be asserted, that it was the sole cause of the humanity which is sometimes discoverable in this dark period; since among the most pagan and ferocious nations, examples often appear of a magnanimity and compassion, which shine forth and dazzle us amid the surrounding gloom. Of this, the accounts of the North American Savages, presents us with many instances; and of this also, we meet with strong proofs among the savages whose history we are examining. The Laws of several of their states, made express provisions to enforce the rights of hospitality, (b) and various histories

(z) See Gibbon, and the Authorities he quotes, Chs. 31. 49.

(a) Id. Ch. 46.

(b) By a Law of the Burgundians, tit. 38. S. 1. whoever refused Bed or Fire to a Stranger, was punished with a fine of three shillings



tories might be related to shew how those rights were respected.

Eminent among the rest is the story of ALBOIN.

There had been old war between the *Gepidæ* and the *Lombards*, and ALBOIN, Prince of the latter, after overthrowing the *Gepidæ* in battle, pierced with his own hand the Son of TURISUND their king.

It was a custom it seems among the *Lombards*, to reward valour with a seat at the royal table; but the son of the King could not sit even with his father, until he had been invested with arms by some foreign Prince.—ALBOIN ambitious of this honour, did not hesitate with forty Companions, to visit the court of TURISUND, and was thus in the power of a hostile and injured Nation. The generous Monarch however, though he could not prevent his grief from bursting forth at the sight of him who had just slain his son; respected the rights of a stranger, protected him from the vengeance of his nation, and sent him home invested with the bloody arms of his child. (c)

But though the virtues of hospitality found eminent place in the conduct of many Individuals; yet stranger Nations in these times had little reason to be happy under the Institutions which governed their intercourse. The establishment of the FEUDAL SYSTEM, introduced all the vigour and harshness of

shillings. By another among the Capitularies, some centuries afterwards, any one who shut his house against another going a Journey, was fined sixty shillings. L. 6. S. 82. and among the *Slavi* it was even a maxim. "Quo nocte furatus fueris, Cras ap-  
"pone hospitibus. See Note F. F. Robert, Ch. 5. Introd. A Law of the *Wifgoths* enjoins not only the good treatment of Merchants and Strangers, but that they shall be tried by their own Laws.

Fuero Jusgo. L. 2. P. 436.

(c) Gibb. Ch. 45. The Paradise of Odin was enjoyed even upon Earth by this fierce Prince, who, having slain the only surviving son of Turisund, fashioned his skull into a Cup, which served him long after at his feasts. Ib.

military

military watchfulness; and men in the bosom of their own Society, seemed to keep guard as if in a camp. If a person therefore removed from one state to another, though it was in search of settlement, the superior Lord might seize him as his Slave. The cruel rights of the Inhabitants of the Sea Coasts against those who suffered shipwreck are well known; and among the Welsh, a madman, a leper, and a *stranger*, might be killed with impunity. (*d*)

If a man even of the same state, past from one province of it to another. he was bound within a year and a day to acknowledge himself to the Vassal of the Lord of the manor where he settled (*e*): The Jus Albinatus, is hardly yet even worn out on the continent, and bespeaks forcibly the inhumanity of the early Law of Nations.

Such then was the situation of Europe from the fall of the Roman Empire, till about the opening of the eleventh century; and we shall probably not be able to discover a period of its history, in which there is to be found, greater licence, less order, and consequently less happiness. In such a situation therefore we cannot expect that any very clear ideas of

(*d*) Leges Hoel Dad. quoted by the Author of Observations on the Statutes, chiefly the more Antient, p. 22.

(*e*) So jealous indeed were our ancestors of encouraging an intercourse with Strangers, that by a law of the Conqueror, no man was allowed to receive a person unknown to him into his house for more than three days, unless he had been previously recommended to him.

Leg. Guil. Conq. apud Wilk. 227.

This was but similar to the spirit of the Saxon Laws of H. Lotharius, Eadricus, and Edward, which enjoined that the host should be answerable for the delinquency of the stranger, in case he entertained him in his own house and nourished him with his own food for three nights together.

Wilkins, Leg. Sax. 9. 203. De Hospitibus.

So also L. L. Withrædi; Si peregrinus vel advena devius vagetur, et tunc nec vociferaverit, nec cornu infonuerit, pro fure comprobatus est, vel occidendus, vel redimendus. Id 12.

the

the rights of mankind, either as Individuals or as Nations, were entertained. Sovereigns found difficulty in conceiving, and more in enforcing a Set of Laws, which should be able to give peace to the interior of their own states ; and it was not till after the eleventh century, or rather till after the discovery of the Pandects of JUSTINIAN, that the municipal Laws of the kingdoms of Europe came to assume any great regularity of shape. We may suppose then how little probable it was, that there could be any thing like a Code under the title of the Law of Nations. To such a Law indeed men never seem to have appealed ; CHRISTIANITY, it is true, obscured as it was, by the interpretation which the Popes chose to give of it, sometimes interfered with effect ; but with respect to maxims of justice, or a common set of Laws for the government of *States* ; they seem not merely to have been shapeless, but absolutely unknown.

An enquiry might here very naturally be made into the nature of the TREATIES which were entered into during this period ; ALLIANCES and positive CONVENTIONS, often supplying the place of general maxims of justice, and forcing men to the observance of an equity which the rudeness of their manners prevents them from perceiving by nature. It is thus, as we before hinted, (*f*) that Barbarous and Infidel Nations have been insensibly produced into more polished Classes, and led to the cultivation of more humane Laws. But the World was so particularly situated, and the darkness so universal during these times ; that while the barbarous nations were allowed absolutely to wanton in every indulgence to which the possession of the most savage liberty could prompt them ; there was no people within their sphere, to

(*f*) Chap. V. ad fin.

set before them a better example, or incorporate them by TREATIES, with a better order of society.

In common Wars, where the conquered people are allowed some indulgence, and respect is paid to their manners and arts; if they excel their conquerors in those points, (which has often been the case,) they have sometimes been the means of polishing even those who enslave them, the stubborn superiority of the latter condescending to adopt their learning or refinements; and thus it was between Greece and Rome. (g) But the destruction of the *Roman World*, was so sudden, and so total; and the object, as we have observed, was so evidently Extermination; that the Barbarians preserved the manners of the desert, amidst the most splendid materials, for civilization, for science, and for elegance. When these materials were destroyed, as they soon were, no other opportunities for recalling them presented themselves from foreign quarters. The West was unknown: the South was scarcely believed to be inhabited beyond certain latitudes; and it was from the East and from the North, that the deluge came. If any nation could have improved them at all by treaty and alliance, at this time, it seems to have been the CHINESE; the doctrines of CONFUCIUS having been cherished among them long before CHRIST. But that extraordinary Empire was removed to a distance far too great from the sphere of their intercourse, to be of the smallest service to them; and possibly, if it could have heard of what was then passing in Europe, it might have considered it as our present nations consider the revolutions of Wydah, or the Caffres.

EUROPE was therefore left absolutely to itself for improvement; and under such circumstances, we

(g) The History of the Tartars and Chinese presents us also with an eminent example of this.



cannot be surprised that its progress was slow. During the middle ages there is consequently a great dearth of diplomatic knowledge; and the Treaties of those times, afford us absolutely nothing to observe upon, as far at least as they relate to the Law of Nations.—What they do present, however, mark them as nations actuated by one common spirit; and though they are almost all *ecclesiastical*, and relate chiefly to the foundation of Convents; the building of Churches; and the grant of immunities to the Priesthood; (*h*) yet that alone distinguishes them from the rest of the World, under the forms of a characteristic RELIGION. (*i*)

(*h*) Vide the Corps diplomatique universel par Dumont—the Cordex Diplomaticus of Leibnitz—the anonymous Recueil des Traités, & Mabilion de re diplomatica—passim during these ages.

(*i*) The forms also in which these Treaties run, prove this very strongly.

The name of Christ, and of the Holy Trinity, was invoked with great Solemnity; and this form, which continues to this day among Christian Nations, began at least as early as the time of Charlemagne.

See Du Mont. r. i. to 6.

CHAP.

## CHAP. IX.

THE HISTORY OF THE LAW OF NATIONS IN EUROPE,  
FROM THE ELEVENTH TO THE FIFTEENTH CENTURY.

IN the last chapter we observed that barbarity and disorder continued to overwhelm Europe till towards the opening of the eleventh century: we must not however suppose that the ferocity of manners and irregularity of principle, which have been recorded, perished all at once after that period. Changes in these points are for the most part effected by the slow lapse of time; for while the whole external face of a country may be altered in a few months by labour and industry; such is the fixed nature of habit and character, that it requires a long course of years to make them unbend, and many a generation wholly to destroy them. The picture therefore which we had of the customs of nations, in the preceding chapter, continues the same in its out-lines and greater features, long after the commencement of the period before us; and though by degrees its tints grow fainter and fainter, till at last they are lost in one far more agreeable; they are still to be traced in full strength through a long line of years, and several centuries pass away before they are entirely expunged. Previous therefore to the ample consideration which we mean to give of the particular circumstances which bore upon, and contributed to alter the law, it will be more perspicuous if we pursue, in this place once for all, the account of such events as justify these observations.

It is one of the most painful tasks of history to be obliged to record the facts which disgrace, as well as those which ennoble mankind, and in examining the customs which prevailed during this period, our humanity will be but too often shocked. Though frequently more regular, they were sometimes not less barbarous than they were during the ages of which we have just been treating. They must however be related, as without them, the account of the times, though it might gain in softness, would lose in accuracy and truth, the most essential points of an historical enquiry.

Of all the nations which at this time pretended to the little civilization that was known, the Normans seem to have taken the lead in the display of cruelty and insolence, as well as of valour. In England they are described by the Monks, as Devils rather than as men, and from their delighting in blood more than other nations, were supposed to be let loose by the Almighty as the ministers of his vengeance. (a) If the facts recorded of them are true, they seem indeed to justify the conclusion. They are said to have put their prisoners to the most unheard of tortures, in order to discover treasures that were supposed to be concealed; they suspended men over fires by the head, the feet, and the thumbs; they crushed their brains with tight ligatures, and threw them into dungeons swarming with serpents. (b) When they turned their eyes on the softer sex, left destitute of protection by the slaughter of their kindred, no law or sentiment of generosity could defend them from their brutality; the Cloister alone afforded them security for their chastity; a proof that the conquerors proceeded on a sort of system, and that their violence was the effect of received customs which knew what was to be respected, not

(a) H. Huntingdon, p. 212.

(b) Chron. Sax. p. 238.



of the mere heat of battle which respects nothing. There is a remarkable confirmation of this in the case of MATILDA of Scotland, who, though a foreign and *neutral* Princess, at that time in England for her education, was obliged to assume the veil under William the First, and was married afterwards to his youngest son. The marriage of a Nun being unlawful, and the clergy examining her upon the point, she assigned the defence of her chastity as the sole motive for her profession: The plea was allowed to be a good one from the *known and acknowledged* customs of the Normans, and was adopted by many others in the same situation and with the same success. (c) Such was the conduct of a people who stigmatized their victims with the name of barbarians, (d) an appellation in which, added to the rights they assumed upon it, they seem to have imitated the insolent ferocity of the Grecian law of nations, mentioned in a former chapter. (e)

The barbarity of the *Scotch* customs of war appears equal to the *Norman*, and the general ravage of a Scottish invasion, more particularly that of DAVID the First, may be compared to the Scythian cruelties; the sick and aged were murdered in their beds, infants at the breast, and priests at the altar. David however was famed for humanity, and the only excuse for him is, that the received customs of the troops he commanded, made it useless for him to forbid what he could not prevent. (f)

In *Italy*, which claims to have been the first to emerge from the barbarism which desolated Europe, cruelties not less shocking were often exercised. At the close of the twelfth century, MARCUALDUS, Seneschal of the Empire, and pretender to the re-gency of Sicily, invaded that Island: He was so far

(c) Eadmar. Hist. L. 3.

(d) William of Poitou. p. 202.

(e) See chapter vi.

(f) Lyttelt. Hen. II. I. 183.



regular as to wait the denial of his demand, before he declared war. When it commenced however, he burst like a storm upon the unfortunate people; he buried most of his prisoners alive; he burned the Ecclesiastics; and those whom he treated with the greatest lenity he threw them into the sea. (g) In 1264, MAINFROY, the natural son of Frederick II. making war upon the pope in Tuscany, punished the prelates who fell into his hands by mutilation and death. (h) On the other side his rival and conqueror CHARLES of Anjou reserved numbers of the prisoners whom he took at the battle of *Beneventum* for his entry into *Naples*, where they were put to death like common criminals; (i) in revenge for which, and other cruelties, twenty years afterwards, two hundred gentlemen taken by the Sicilians in a naval battle, were beheaded in cool blood by the famous admiral LORIA. (k)

A milder punishment on that occasion was experienced by the common soldiers, who were sent to the galleys, and who as a mark of infamy were first condemned to have their hair cut off. (l) It is remarkable that the loss of hair should have continued thus long in Europe to be a sign of disgrace. Under the *Merovignian* race of kings in France, it was the same as the loss of the crown; and amid the frequent revolutions which that family underwent, every dethroned prince was regularly shaven and thrown into a convent, after which it was supposed that he could not pretend to public affairs. The pride of long hair was extremely antient among the northern nations, and is to be traced far back among the Scan-

(g) Ep. 157. ap gest. Innocent III.

(h) Burigny Hist. de Sicil. 2. 145.

(i) Id. 21. 160. (k) Id. 2. 208.

(l) Burigny Hist. de Sicil. 2. 207.

dinavians. (m) To endeavour to account for it, any more than many other human prejudices, would probably be vain, it is sufficient to have remarked the fact.

Perhaps indeed it may be denied that these and a number of other examples were in conformity with the received laws of war, and they may be supposed rather to have arisen from the accidental bursts of violence in particular men. Their universality however, and, what is worse, their duration all over Europe, prove them to have been the consequence of settled customs; and the custom of nations, as has often been observed in the course of this work, is the only law which can govern them, when particular conventions have not been agreed upon. Numbers of the cases of barbarity which present themselves, are besides so regular and uniform in the circumstances of their severity, that they must have been founded on general maxims. There was a fixed object proposed in them, and they were the means adopted to obtain it.

Among these might be reckoned the barbarous military punishment of *mutilation*; instances of which are perpetual throughout the histories of Europe. They are matters of horror, but they must be related, and we may then judge whether they can be deemed mere acts of disorder.

In the tenth century, THEOBALD duke of Spoleto, who is described by the historian as not undeserving the title of hero, having condemned his captives to the most odious of all mutilations, granted them

(m) See the story of the young men of *Insburg*, put to death by Trochill. The seventh of them, says the record, had long fair hair, as fine as silk, which floated in curls and ringlets on his shoulders,—being asked what he thought of death, I receive it willingly replied he; I only beg of you one favour, not to let my hair be touched by any one of a lower degree than yourself, nor be stained with my blood.—Mallet's North. Antiq. i. 205

mercy at the prayers of a woman. Being asked however what punishment her husband deserved should he be again taken in arms, her answer marks the spirit of the times. "He has eyes and a nose, said she, hands and feet, these are his own, and these he may deserve to forfeit by his personal offences." (*n*) The maxim continued long afterwards in Europe. Not to go into our own story beyond the time of William the Conqueror, whose severities this way are well known; his son RUFUS took vengeance upon the Welsh in the year 1098 by cutting off their feet and hands: (*o*) In 1107 Robert duke of Normandy lost his eyes for endeavouring to break prison to which the laws of war had condemned him. (*p*) In 1136 Magnus king of Norway was emasculated by Eric of Denmark; (*q*) and in 1190 the Suabian Emperor Barbarossa, delivered his captives of Milan to the knife of the executioner, or shot them from military engines. In the next century Marcualdus punished the Sicilian nobles with different mutilations; and sixty years afterwards Mainfroy, as has been observed, made war on the clergy in the same manner.

The barbarous treatment of Roger II. by the Emperor Henry VI. may be attributed to motives of policy, rather than the received customs of war; nevertheless we can have little idea of the regularity of those times, when even with these motives, a king conquered by another in open war, was emasculated, and delivered over to perpetual imprisonment, in order to cut off all hope of posterity. (*r*)

At

(*n*) Luitprand Hist. L. 4. ch. 4. I have transcribed Gibbon's translation. See the whole of that curious story. Dec. & Fall. 10. 254.

(*o*) Cod. Leg. Vet. Spelm. ap. Wilk, p. 283.

(*p*) Mat. Par. 60.

(*q*) Mod. Un. Hist. 28. 461.

(*r*) Ut spem omnem et successionis Henricus adimerit, et de jure hæreditatis futuræ posteris litigandi surriperet causam, gentiles



At the siege of Lisbon in 1370, it was the custom of the Spaniards says Froissart, when they took a prisoner, to tear out his eyes, and cut off his feet and hands, and in that condition to send him back with a message to his countrymen, threatening them all with the same fate. (s) Lastly it is said to have been the resolution of the French before the battle of Agincourt in 1415, to cut off the three fingers of the right hand of every English archer who should fall into their power; a design of which Henry well knew how to take his advantage, in his speech to the soldiers on that memorable day. (t)

Shocking as this mode of military vengeance appears, we probably are not to attribute it altogether to the ferocity of the times, and certainly not to the sudden passion of individuals. In all probability it took its rise from deliberate views of policy. In an age when war was the sole business, and the power of doing active mischief was therefore considered as the highest endowment, the value of the members of the body was heightened in proportion; and as the theory of punishment speculates chiefly on those things on which it best can take effect, the forfeiture of the limbs came thus to be a common penalty even under municipal laws. We cannot therefore wonder if under the law of nations, where so much must always be left to the discretion of the conqueror, the same spirit should appear. Accordingly, it seems to have governed both the warrior and the legislator, and was found in the camp as well as in the hall of justice.

Another strong mark of defalcation of proper principles, rather than of mere bloodiness of disposition, appears in the frequent use of poison, which

*tales illi partes defecans, Eunuchum fecit, et carceri ad mortem usque addixit.*—Fazellus. de. reb. Siculis. 435. 39.

(s) Froissart B. 3. ch. 28.

(t) Villaret Hist. de Fr. 3. 172.



we find during this period. If the death of enemies was the chief object in battle, it was of little consequence it was supposed, how it should be accomplished. Hence the use of poisoned arms, and the still more shocking expedient, sometimes fallen upon, of poisoning the wells of a country or town through which soldiers were to march, or which they besieged, was at least customary, if it was not absolutely legitimate. The death of Cœur de Lion was owing solely to the poison of the arrow which wounded him; (u) and so far down as the year 1563 we find an instance of the same kind in France; Ambrose Earl of Warwick having died of a wound which he received in the leg, at the defence of Newhaven, by a poisoned bullet. (v) The latter horrid practice, (not to stop here at the supposed manner in which the Greeks got rid of the Crusaders,) is to be found at least as far down as the siege of Bourges in 1412, where the French are said to have corrupted the fountains in the suburbs, the better to cut off the besiegers. (x)

A prisoner in these early ages being supposed to be perpetually at the mercy of his conqueror, even long after the battle in which he was taken; it was not considered as unfair to look upon him as an hostage for what might be done by the enemy, or to threaten and to exercise severity against him, in order to extort what otherwise perhaps might not have been easily obtained.

Upon this principle it was, that HENRY the Fifth proceeded in several of his sieges in France. At *Rouen* in 1418 gibbets were erected all round the city, and as a mark of what the inhabitants might expect if they persisted to defend themselves, the

(u) Mat. Par. 195.

(v) Birch. Mem. of Q. Eliz. v. 6.

(x) Monstrelet. Chron. de Fr. sub. an. 1412.

prisoners were hung up upon them in sight of their friends. The same conduct was pursued at *Monteran* in 1420.—Yet Henry after the capture of *Rouen*, had stipulated that a large body of citizens who had been expelled the city in order to save provisions, should be restored and fed for a twelvemonth at the expence of the inhabitants; (y) and from this and other instances, (particularly that famous proof of his knowledge of what good order required of him which has immortalized his youth,) it should seem that it was not so much his own barbarity, as the custom of the times which led him into these cruelties.

Upon this principle also it was, that *Beatrice* sister of *Constance* queen of Arragon, was delivered from a long captivity in which she had been held by Charles of Anjou the conqueror of Naples. The Arragonians having defeated and taken in a naval battle the prince of Salerno, the queen dispatched a vessel with him into the port of Naples, where the captain calling forth the princess his consort, pointed out her unfortunate husband on the deck, an executioner at his side and menaced him with instant death if *Beatrice* was not given up. This was done upon the spot, (z) and he himself was afterwards detained to be once more the instrument of the same kind of policy. His father meditating the siege of Messina which was the place of his captivity, the Messenians threatened again to put him to death if the king should dare to set foot in Sicily. (a)

The history of this house of Anjou is fertile in events of consequence to the law of nations.—Far before the rest is the case of the unhappy CONRAD-

(y) *Monstrelet. Chron. de Fr. v. 1. ch. 201, 225.*

(z) *Burigny, Hist. Sicile 2. 208.*

(a) *Burigny Hist. de Sicile 2. 208.* It was a policy of the same kind which was supposed to have saved Paris from the duke of Brunswick in 1792, when the unfortunate Louis XVI. was detained prisoner by his subjects.

**DIN.** This unfortunate young prince, if lineal succession could have been allowed to take its course against the infallible will of the sovereign of Rome, was the undoubted heir to the crown of Sicily. (*b*) But that mighty power having through hatred to his family bestowed the kingdom, whenever he should conquer it, upon the Count of Provence, and the battle of Beneventum having decided it in his favour, the Count succeeded quietly to the enjoyment of his conquest. After a few years however, the young Conradin with a spirit of adventure far beyond his age, seconded by his friend and cousin Frederic of Austria, as young as himself, prepared to assert the rights of his house. They were both of them met, defeated and taken by the inexorable Charles, whose treatment of them on this occasion forms a case in the law before us, about which there has often since, been much difference of opinion. Unwilling to incur the character of a tyrant who could himself bear all the guilt of blood and murder, he resolved to adopt a conduct infinitely more prejudicial to the rights of mankind; since men may guard against what all allow to be forbidden, but can never escape the murder which is sanctioned by law. Assembling therefore the judges, he brought his prisoners before them, and after having heard with care (to use the expression of the historian,) "*all the reasons that could be drawn from law, and the jus publicum,*" they were found guilty of *treason*, and condemned to suffer death on the scaffold. (*c*) They were ac-

(*b*) He was the grandson of the famous Frederic II. Emperor of Germany and king of Sicily, whose quarrels with the Pope are so celebrated in history.

(*c*) An antient French historian gives the following account of it. "Illuec fit assamblar plusieurs Seigneurs de loys, et autres sages hommes, & jugierent que *par droit* il devoit avoir les chiées coupés, comme cil qui estoient coupable de la malvestie et desloyeauté esgenée."—Guillaume de Nangis. Ann. de St. Louis. 267. See also Velly Hist. de Fr. & Giannone. 19. 2.

cordingly



cordingly led into the market place, and after having been reproached with their crimes, and forced with a refinement of cruelty to assist in the chapel at their own funeral service, they patiently submitted to the axe of the executioner.

When we consider in this remarkable case, that neither CONRADDIN nor his cousin FREDERIC were at all dependent upon Charles; that allowing him to have been the lawful king, they owed him no allegiance, that they came in arms as open enemies, and made war upon him according to the forms of war; we shall find difficulty in discovering by what maxim of justice they could be condemned. Carrying the rights of war to their utmost extent, Charles after the battle might have kept them in perpetual imprisonment, or with strong hand might have swept them from the world, as enemies with whom he never could be safe. That he could condemn them according to the forms of a judicial process, can only be attributed to the peculiar irregularity of the age. At the same time it deserves to be marked as a fact well worthy of notice, that while every thing seemed to bend before the fortune of the house of Anjou, a man was found adventurous enough to question the validity of the sentence, and to write a book to prove that it was contrary to the law of nations. This was *Succaria*, a civilian of those days, (d) and his book, whether well or ill executed, presents us I believe with the first instance of the law of nations considered of importance enough to be treated as a science. The case however continued on the records of the world, and stress was laid upon it three hundred years afterwards, by those who condemned the unfortunate queen of Scots. (e)

More than a century after this, (1384) the same family furnishes us with another example of the

(d) Burigny Hist. de Sicile, 2. 174.

(e) Camden's Eliz. p. 376.



same sort of violence. *Jane*, the descendant of Charles, having adopted the duke of Anjou, brother to Charles the Sixth of France as her heir; the duke of Durazzo, who was next in succession, made war upon her, and became master of her person. As her own right to the throne, had never been doubted, there was not a pretext to put her to death; but *Jane* in the course of her reign, had been guilty of infidelity and murder, and the law of nations of those times, which permitted every irregularity, seemed even to command, what certainly was but retribution. However sacred therefore the inviolability of crowned heads may be considered by more regular maxims; the maxims then in existence called loudly for her punishment, and she was strangled in consequence, by order of her conqueror, as she herself had strangled her first husband Andrew of Hungary some years before. (f)

The deliberate execution of officers after having behaved gallantly at their posts though forced to submit to superior power, is still less to be defended. We observed instances of this in all the periods we have yet touched upon, and it continues during that immediately before us. The whole of the garrison before which RICHARD the First lost his life were immediately put to death by that prince, except the soldier by whose arrow he fell. But though pardoned by the king, in whom the seeds of true magnanimity seem only to have been stifled by the barbarity of the times, he was but reserved for a severer vengeance; being unmercifully flayed alive by *Markadeus* second in command. (g)

The well known fate of the brave Sir William Wallace in 1305 is a disgrace indelible to the English name and the character of the age.

(f) Pasquier recher. de la Fr. 6. 26.—Giannone 23. 5.

(g) Hovedon. p. 791.

In 1414 Beurnonville commander of Soissons for the duke of Burgundy, being forced to yield the town after a vigorous defence, was taken deliberately to Paris, and led to execution like a criminal, in revenge for the death of Hector de Bourbon, killed during the siege. (*h*) I pass over the condemnation of the famous Joan d'Arc, since (however it may fully the reputation of the duke of Bedford for not saving her life,) the avowed motive for her death, was her being an enchantress and an heretic, and therefore it cannot in any sort be brought under the customs of war. (*i*) Too many examples however may be adduced in support of the point in question, and it is remarkable that they occur most frequently in the very century from which a celebrated historian looks back upon the progress of mankind from the barbarous ages, and pronounces it to be immense; they occur also under characters which we are accustomed to regard with favour and respect.

At the siege of *Rouen*, mentioned before, HENRY the Fifth reserved by an express article of the capitulation, a certain number of men on whom he should be allowed to exercise his rights of vengeance.

In 1421 at the siege of *Meaux*, Vaurus the Governor, in order to inspire an irreconcilable hatred into his soldiers against the English, sent his prisoners regularly to an Elm, (which on this account was called the Elm of Vaurus,) where they were hanged without mercy. "Let them be carried to my Elm," were the words of the inexorable sentence. The English of course retaliated, and with comparative mildness, contented themselves on the fall of the place, with putting to death six of the principal officers, at the head of whom was Vaurus himself. (*k*)

(*h*) Monstrelet ad an. 1414. v. 1. ch. 121. His head was stuck on a lance, and his body hung up by the armpits.

(*i*) See a long and able but partial account of her process in Villaret, 3. 432. et infr. & v. 4. ad init.

(*k*) Chron. de Monstrelet, ad an. 1421.

In 1431 the Commandant of Guerron, a garrison in Champagne, being pressed to extremity by Luxemburg, a French general, could only save the majority of his soldiers by yielding up every fourth and sixth man to the mercy of the conqueror.

The garrison passed in view before Luxemburg, the victims were chosen, and executed on the spot by one of their own body, who was forced to serve this bloody office. (l)

In 1476 I find a strange law of war which in these days would be held equally infamous. The duke of Burgundy having besieged Nanci; efforts were made by several gentlemen to throw themselves into the place. One of them being taken in the attempt, the duke ordered him to be immediately hanged, *saying that it was contrary to all the rights of war, when a general had begun the siege of a town, and the fire of the artillery had commenced, for any one to attempt to enter the fortress in order to defend it.* Commynes who gives the account adds that this was really the custom in Spain and in Italy. (m) In 1479, Maximilian archduke of Austria, being arrested three days in his progress by Raimonet commander of the little castle of Malauny near Terouenne, that governor was instantly hanged on the surrender of the castle. (n) Near three hundred years from the time of Richard I. when such enormities were most frequent, had thus produced no amendment. The latter days of Maximilian come within the period to which the maxims and politics of later times are usually traced; but all through the century in which his name so often appears, the customs of war are peculiarly shocking.

The cruel and mutual ravages of the French and English are said to have been such, that neither man nor woman was to be seen in the whole country of

(l) Monstrelet sub. an. 1431.

(m) Commynes, L. 5. ch. 6.

(n) Contin. of Monstrelet. p. 71.



Caux, except the garrisons of fortified places. (o) Nor can there probably be a more feeling description of the miseries of war in these barbarous times than the following translation of Speed from Polydore Virgil. " While the English and French (quoth he) contend for Dominion, Sovereignty, and life itselfe, mens goods in France were violently taken by the licence of warre, Churches spoiled, men every where murdered, or wounded, others put to death, or tortured; Matrons ravished, Maydes forcibly drawne from out their parents armes to bee deflowered, Townes daily taken, daily spoiled, daily defaced, the riches of the inhabitants carried whither the Conquerours thinke good; houses and villages round about set on fire: no kind of cruelty is left unpractised upon the miserable French. Neither was England her-self void of these mischiefs, who every day heard the newes of her valiant Childrens funerals, slaine in perpetual skirmishes and bickerings, her generall wealth continually ebd, and wained, so that the evils seemed almost equall, and the whole Western world echoed the groanes and sighes of either Nations quarrels, being the common argument of speech and compassion throughout Christendom." (p)

Savage however as this picture has represented the English in their mode of making war, we have authority for believing that they exceeded all other nations in the regularity of their proceedings, at least according to the ideas of the age. The devastations that have been described were therefore common all over Europe, and miserable indeed must have been the lot of the world. (q) We cannot then agree with

(o) Chroniques de France. 124.

(p) Speed. p. 668.

(q) Philip de Commines who lived long in the century during which most of the inhuman practices that have been mentioned took place, has this remarkable passage. " Or selon mon advis,

" entre



with the remark of Dr. Robertson, (as far at least as it may be supposed to concern the law of nations,) that the progress which mankind had made towards order and refinement, from the fall of the Roman Empire to the opening of the fifteenth century, must appear immense. (r) Much no doubt had been done; towards the melioration of municipal establishments, much in some of the sciences, and in many of the arts: but of the law of nations, as founded on the principles of humanity and justice, men scarcely seemed to have thought.

While such poor respect was thus paid to the lives of persons who according to every sentiment of generosity, if not according to the principles of strict right, were entitled to them, we cannot be greatly surprised that even during times of peace, little regard was shewn to their liberty.

The power of moving at pleasure over the earth, is one of the natural rights of mankind; and though this right has been curtailed in consequence of the institution of property and dominion, so that men have no longer the liberty of entering at will into one another's territories; yet whenever this is done, the utmost that ought to ensue is immediate expulsion. The right to detain them prisoners can never be justified, and is strenuously denied by all christian civilians. Nevertheless, we saw it universally exercised under the Greek and Roman law of nations, (s) and notwithstanding the efforts of the Christian Church, the practice was by no means worn out during the period before us. A great number of examples might be adduced to prove this. I shall confine myself to those few which were of the greatest consequence to

“ entre toutes les Seigneuries dum monde dont J'ay connoissance,  
 “ où la chose publique est mieux traitée, et où il y'a nuls edifices  
 “ abbatus, ny demolir pour guerre, c'est Angleterre; et tombe le  
 “ fort et le malheur sur ceux qui font la guerre.” L. 5. ch. 19.

(r) CHARLES V. Introd. S. 2.

(s) See chap. vi.

others; and which from the sacredness of character in those concerned, made every attack upon their inviolability appear the stronger.

Possibly the celebrated Norman invasion, and if so, the whole tenor of our laws, and by far the most important transactions of the earlier part of our history, may in some measure be attributed to the existence of this unjust custom. In the year 1062, HAROLD duke of Wesssex, an aspirer to the crown of England, was driven by a storm into one of the ports of the earl of Ponthieu on the coast of *Normandy*. There was no war at that time between the countries, but the Earl immediately seized him, in order, according to the custom of the age, to make advantage of his ransom. The prisoner however was demanded by the duke of Normandy his superior lord, not, as it might be thought, to set him at liberty without recompense, but before he gave it, to exact from him an oath that he would not oppose him in his own designs upon the throne. HAROLD declared the oath void on the plea of "*Duress*," and pursuing his fortune obtained the crown. The flimsy title of William received no small support in the eyes of men from this supposed perjury of the duke of Wesssex, with which he did not fail perpetually to reproach him. (1)

A more celebrated example of this sort of injustice, appears in the case of RICHARD the First.

It is well known that that prince on his return from the Holy Land, was shipwrecked in the Adriatic, and endeavouring to pass through the territories of the duke of Austria, was arrested, thrown into prison, and afterwards sold to the emperor Henry the Sixth. Although this as might be expected, raised much indignation among his subjects, and actually

(1) See Will. of Malmsh. L. 2. p. 52. L. 3. p. 56. Mat. Pa. p. 1.

called down the thunders of the Pope, to whom he appealed, against the authors of his misfortune; yet no mention seems to have been made of the transaction, as a breach of the custom of Nations. The one seems to have arisen from affection; the other from the reputation he had acquired in the service of CHRISTIANITY, and the well known law that no one who had assumed the cross should be interrupted by any act of hostility from enemies at home. Neither the representations of the See of Rome to Henry and Leopold, nor his own complaints, which resounded throughout *Europe*, make the least mention of it, as a violation of public law: on the contrary the affair in the measures that were taken upon it, seems to have been nothing extraordinary. Henry writes an ostentatious account of the arrest to Philip of France as a fortunate event which would please him, and claims merit from the transaction. (u) The immense ransom of 100,000 marks was demanded, several severe articles were prescribed, and sixty-seven hostages agreed upon for their performance, (x) as if he had been taken prisoner in open battle. The ransom was regularly raised according to the feudal provisions for such cases, and his mother Queen ELEANOR took a voyage to Germany for the settlement of the affair. Before it was completed however, there were many negotiations with the King of France who wished to purchase this illustrious captive, and it was owing chiefly to the veneration which the princes of Germany had conceived for him, that the sale did not actually take place. (y) The sale of prisoners, it is to be observed, as a matter of property, was perfectly within the rules of nations

(u) Hoveden. 410. Heming. cap. 63.

(x) Rym. Fœd. 1. 84.

(y) Rapin Thoyr. Sub an. 1194.



then in practice, as we shall presently have occasion to demonstrate.

Two hundred years afterwards, we find a remarkable instance of the same kind. In 1406 ROBERT king of Scotland, dreading the violence of his brother the duke of Albany, resolved to send his son and heir JAMES, for safety as well as for education, to France. The young prince sailing along the coast of Norfolk in his passage, and being seized with illness, had the imprudence to venture on shore. He was immediately arrested by the people on the coast and conducted to HENRY the Fourth, who sensible of the value of such an instrument against a nation with whom there was almost perpetual war, detained him captive. There was however at that time no war between the countries, and James even came provided with a letter from his father to Henry, in case he should be obliged to touch in his dominions. His captivity lasted eighteen years; during which, as the only palliation that can be offered, no care was wanting to complete his education. At the end of that time he was not released but on the payment of a regular ransom of forty thousand marks, and swearing to preserve a peace between the kingdoms. (1)

The next century saw the custom still in existence, and it is England again which furnishes the case.

In 1506 the archduke Philip, king of Castile in right of his wife, passing through the channel from the Low Countries to Spain, was forced by a tempest into Falmouth, where he landed, "weary and sicke," says Speed, "with the violent tossings of the sea." The news of his arrival (to pursue the account) stirring up the men in authority thereabout, Sir Thomas Trenchard, with the sudden forces of the country, not knowing what the matter might be, came thither, and understanding the quality of the stranger, sent

(1) Rym. 10, 299, 300.



off post to Court for instructions. Sir John Carey also came down to the coast with a troop of armed men, and Philip fearing constraint, because *they durst not let him pass without leave of the king*, was obliged to yield to his fortune. HENRY the Seventh, at that time upon the throne, knew the value of this opportunity too well to let it slip, nor would he suffer Philip to depart the kingdom. till he had extorted from him the Earl of Suffolk, his rival, to whom Philip had till then afforded an asylum. (y) Such were the maxims and conduct of States during the times before us, in cases where justice and the laws of hospitality, even as practised by savages, called loudly for the reverse. (z)

While things during a state of peace bore so much the appearance of war, it was not unnatural for the great men of those times to view one another with a jealousy that was perpetually on the watch; and the manner in which this jealousy displayed itself will furnish the next object of our considerations.

The mutual fears of private men are rendered useless, and are therefore dissipated by the protection of the laws; but the fears of kings, who are the representatives of whole states, and who are therefore independent of all tribunals, can never be laid aside, except through the influence of good morals; and where these are unknown, distrust must be universal. Hence the precautions which States are constantly

(y) Speed. 761.

(z) The practice was not worn out even so low down as the last century; Cardinal de RICHELIEU, whose progress was seldom retarded by scruples, having arrested the Elector Palatine, who had ventured into France upon the strength of being at peace with that kingdom. The real motive for his imprisonment, which was a very close one in the Bois de Vincennes, was his design to treat for the army of the deceased Duke of Saxe Weimar; the assigned reason, *the right which all nations had to arrest strangers who came into the country without a safe conduct*. See Bougeant' Hist. de la P. de Westph. L. 5. S. 60.

taking

taking one against another ; and hence, during the ages in question, the fear even of personal violence was indulged, and for the most part provided against, whenever Kings or Generals came into contact with one another. Of this there is a variety of instances, and none so remarkable as that exhibited perpetually by two Sovereigns who, from their weight and power, the one in temporal, the other in sacred matters, were without contest regarded as the heads of Europe. The continued clash of interests which divided the Popes and the Emperors, it is not our business to examine. It is well known, however, that the former boasted themselves the successors of Saint Peter ; the latter of the antient Cæsars ; in virtue of which, they both equally claimed superiority over each other. This, as might be expected, produced a lasting jealousy ; and as the ceremonial of Europe ordained that the Emperors should receive their sacred unction from the hands of the Popes, it was usual, previous to the commencement of a ceremony where they were to approach so near to one another, for each of them to take an oath *that they would not be guilty of assassination during its performance*. This remarkable oath was duly administered to FREDE-  
RICK BARBAROSSA and ADRIAN IV. upon the coronation of the former at Rome, in 1155. (a)

Commines has set before us, with great liveliness of colouring, the mutual distrusts of CHARLES the Bold, and LEWIS the Eleventh.

After the battle of *Mont Pheri*, a treaty was set on foot between those two famous rivals, which was soon concluded at Conflans. While the negotiation went on, there was a suspension of arms, during which they had several conferences together, between Paris and the Burgundian camp ; and one day the Count suffered himself to return with the King

(a) Voltaire. *Esp. des Nat.* 2. 2.

within the very ramparts of the town. In modern times such a procedure would not have been reckoned uncommon; it would have caused neither surprise nor fear; the Count, however, is related to have been quite astonished (*tout esbahi*) at his own rashness, though he put the best face upon it; and when it was known at the camp, the whole army was filled with consternation. The soldiers, who were amusing themselves in the fields without the intrenchments, were immediately called in, and the generals assembled together in council, where, after many murmurs at the rashness of their leader, the Marechal de Bourgogne spoke as follows:—"If this young madman *has thus gone to his ruin*, do not let us on that account be the ruin of his family and ourselves: let every man retire to his post, and be prepared for the worst; we are still strong enough, if we keep together, to reach our own frontiers." Soon after this, the Count returned safe; and, upon seeing the Marechal de Bourgogne, cried out, "Do not blame me, for I know my own madness." All the army, says the historian, praised the honour of the king for not seizing him while in his power; which, however, it was not again thought prudent to tempt. (b) It is needless to observe upon the customs of that time in which praise could be given to a man for not doing what, according to our present ideas of justice, would have drawn upon him the universal execration of Europe.

When the same Monarch was invaded by EDWARD the Fourth of England, he wished to avoid extremities by negociation; and for that purpose demanded a conference with the King at *Picquigny*. The distrust of the times made it impossible for these two crowned heads to meet without precautions, which would disgrace a modern transaction of the same

(b) Communes, L. 1. Ch. 13.



kind. Upon a bridge over the Somme was erected a barrier of strong trellis-work, such as forms the cages of lions, the bars extending no farther asunder than to admit a man's arm with ease. Four gentlemen of the king of England's party were admitted on the French side, to see, says Commynes, what was doing among them; and as many from their party, and for the same purpose, on the side of the English. In this manner it was that the heads of the greatest nations in Europe were obliged to meet (c) in the course of a transaction which of all others demanded confidence, and friendship, namely, the settlement of peace.

This mode of meeting on different sides of a barrier, was at that time common; Lewis had taken the same precaution before, in his interview with his own constable St. Paul, upon the bridge of Noyon; (d) and the Dauphin his uncle had set him the example at his meeting with the Duke of Burgundy on the bridge of Montereau Faut yonne, where indeed the latter lost his life.

While such was the conduct of crowned heads and men of power towards one another, it was almost a necessary consequence that these who were only their representatives should experience a treatment, and live under customs, at least as irregular. The facts relating to the conduct towards Ambassadors and Heralds, during these times, evince it but too fully. Edward the Black Prince, who was the flower of chivalry, and whose courtesy in war will be renowned as long as our language shall exist, was himself, according to our present maxims, not without fault in this respect; and his conduct towards Charles V. of France, together with the deliberate advice of his council, as described by Froissart, will

(c) Commynes, L. 4. Ch. 9. 10.

(d) Id. L. 3. Ch. 21.



set before us very plainly the lax ideas upon this subject that were then entertained.

When Charles V. sent Envoys to him at Bordeaux, to summon him to answer certain complaints which were preferred against him: he was at first, says Froissart, quite melancholy at the affront. His barons and knights, (who it must be observed were then the most courteous and most accomplished in Europe.) counselled him *to put the messengers to death*, as the best recompence he could give them for their freedom; but this he forbade. Understanding, however, that they had come to him without a safe conduct, he ordered them immediately to be pursued, taken, and thrown into prison, which was executed with joy, adds the historian, by his council. (e) This conduct of the Prince of Wales made Charles more cautious in his declaration of war against his father, to whom, fearing perhaps the same sort of treatment, he sent his defiance by the hands of a mere servant; and the Ambassadors at that time at the court of England, are represented as *tous joyeux* when they found themselves safe within the fortrefs of Boullogne. (f) Villaret in representing this fact observes that the French King sent his declaration by a servant, fearing that the *law of nations* would not be more respected at London than it had been at Bordeaux. (g)

The term Law of Nations, however, is his own; Froissart relates the naked circumstance of the case, and does not seem even to hint that the procedure of the Prince was contrary to the notions of right at that time received. In fact, notwithstanding the chivalry of the age, which, as will be seen, produced much change in the laws of war; cases of nicety

(e) Froissart, V. i. Ch. 248.

(f) Id. Ch. 251.

(g) Hist. de Fr. i. 389.

were too little understood, and customs were far too irregular to build upon them as a settled system; Villaret therefore, not only in this, but in other instances of his excellent work, goes too far in attributing any precise idea of the law of nations to these ages, which he constantly does when he speaks of their violation. In 1350, Raoul Comte d'Eu, constable of France and prisoner of the king of England, obtained leave to return home on his parole to procure his ransom, and treat of some matters of state. His conduct at Caen, where he had been taken, is allowed to have been such as to render his fidelity to France suspected; and he was painted to the king, JOHN II. as a partizan of EDWARD, come to stir up sedition. For this, and for other treasons which *it is expressly stated he had confessed*, he was beheaded; and Villaret calls this, not only a breach of the law of France, but of the law of nations (*h*) In the forms of his process, that the laws of France were violated, may possibly be true; and undoubtedly according to the comprehensive and scientific mode in which the law of nations has been treated by the moderns, JOHN may be said to have been guilty of a breach of that law also, by executing a man who, though his own subject, was, as a prisoner of another, civilly dead with respect to him. But whether the state of the law in such times as we have described, admitted of such nicety of speculation, and whether, consequently, Villaret has not, in common with others, fallen into the fault of supposing the law of nations to be always the same, may be made a reasonable question.

Instances in truth perpetually occur, both before and after the above-mentioned transaction of the Prince of Wales, in which the rights of Ambassadors and public messengers were set at defiance. In

(*h*) Hist. de Fr. i. 15.

the year 1258 ELIZABETH, queen dowager of Sicily, sent Ambassadors in behalf of her son to MAINFROI, who had possessed himself of the kingdom; and these deputies exercising their function with too much freedom, were seized and put to death by that hardy usurper. (i) The Ambassadors also whom she sent to the POPE on the same subject, by his contrivance met with the same fate. (k) In 1350 the Pope's legate, the representative, not merely of a temporal sovereign, but of the spiritual Father whom it was impiety to oppose, was hung up by the heels by DON PEDRO, king of Arragon, till he took off an excommunication he had ventured to publish; (l) and in 1464 LEWIS XI. in the case of the arrest of *Rubempre*, by the Count of Charolois, held publicly by the mouth of his chancellor, before PHILIP duke of BURGUNDY; that the orders he had given him (*Rubempre*) to arrest the agent of Brittany going to the court of Edward IV. his enemy, were perfectly legitimate, although at that time there was peace between Brittany and France. (m)

But if these proceedings should be esteemed mere violations of law, (and it must be acknowledged some of them are quoted more with a view to shew what was actually done, than what was actually legal;) there is one case in the thirteenth century, sufficiently remarkable, and which is expressly stated to have been the consequence of received custom. The patriarch of Jerusalem, says Joinville, had become the captive of the Emirs of Egypt, "Suivant la coutume alors usitee en PAYENNIE, comme en CHRETIENTE que quand deux princes estoient en guerre, si l'un d'eux, venoit a mourir, les Ambassadeurs qui s'estoient envoyes reciproquement, demoureroient

(i) Burgin. 2. 128.

(k) Id. Ib.

(l) Mod. Un. Hist. 17. 195.

(m) Commine, L. 1. Ch. 1



"ent, prisonniers et esclaves." (n) It may be supposed that this law of nations related only to the practice of war between *Christians* and *Saracens*, which, as we shall see, was often very different from that of the *Christians* among one another; the passage cited, however, observes expressly that it was the custom among *Christians* as well as Pagans.

Be this as it may, these examples, taken from the history of various nations, and various parts of the period before us, demonstrate the little regularity that had hitherto been introduced, even into a part of the law of nations which on account of its necessity is almost the first that is attended to by all communities. The very *heralds*, without which war can hardly be carried on, were not always safe. The duke of BEDFORD, regent of *France*, the most accomplished prince of his age, loaded the *Guienne* herald, sent to him by the famous *Pucelle*, with chains; (o) and though there is nothing which appears to have distinguished our Edward IV. for cruelty beyond other generals of the time, yet when LEWIS XI. commanded one of his servants, who was not a regular herald, to assume the habit of one, and bear a message from him to the English camp, he is said by *Commines* to have fallen upon his knees and bewailed his fortune, as one sent to instant death. (p) *Molloy* makes a question upon this, whether the circumstance of the messenger's not being a regular herald, would have entitled *Edward* to have used violence towards him. (q) The question is not invidious, as the laws concerning heralds were, from

(n) Joinville vie de St. Louis, P. 67.

(o) Villaret, 3. 408. Possibly he might be excused by the circumstances of the times. The duke for his nephew, crowned *king of France*; the herald summoned him to yield up the kingdom to Charles VII. the true king, and things were thus in a state of civil war.

(p) *Commines*, L. 4. Ch. 7.

(q) *De Jur. Mar.*



their universality, part of the laws of nations; and they were known by a particular habit, which it would have been dangerous if every one had been allowed to assume at pleasure. As it was, the messenger (there being no herald in the camp of *Lewis*,) was obliged to make himself a coat of arms out of the ensign belonging to a trumpet, (r) and possibly his fright might have arisen from his knowledge that he was so far an impostor, as not to have been regularly clothed with the character he was about to undertake. If this were so, it is a remarkable part of the law of nations. In the present day, any one taking upon him the ensigns of office, and actually employed by men having sufficient authority, would be considered in his person as sacred and inviolable.

In times like these, men had not quitted the only, or at least the chief mode by which mistrustful and perfidious nations endeavour to exact the preservation of good faith. We shall perhaps, in a future work, have occasion to treat of the general subject of *Hostages*: but as this is merely an historical enquiry, it will be sufficient in this place to mark the ideas entertained at this time of the rights concerning them. They were violent to a degree of cruelty and blood, it being imagined (and the practice accorded with the theory,) that an hostage was delivered up to the absolute will and licence of the person receiving him; and as good faith was no part of the character of the times, the lot of these unfortunate men but too often challenges our pity. Severe imprisonment, mutilations, and death in cool blood, attend them everywhere throughout the histories. The Emperor HENRY IV. returning from the conquest of Sicily, carried away with him the principal lords and prelates of that kingdom, as hostages for the fidelity of the rest. The kingdom rising against

(r) Commynes, ub. sup.

him in his absence, they were all punished with the loss of their eyes. (s) The city of *Moissac* in Gascony, having given hostages to surrender by a particular period if not succoured, the duke of *Anjou*, says Froissart, came there with his army and hostages at the appointed time, and prepared to put them to death, in case the commanders broke their faith. The town *knowing the custom of war*, surrendered immediately. (t)

But the most ample elucidation of the custom is to be found in the history of the siege of a little castle in Brittany belonging to Robert *Knollys* a famous general of Edward III. It is attended with such regular and deliberate cruelty, proceeded so plainly upon principles, and describes so fully the manners of the time, that it deserves to be related in all its circumstances.

*Knollys*, lord of the castle of *Derval*, near Brest, being called away to that city, left it besieged under the command of James *Bruce* (or *Brosse*). The French pressing the siege, *Bruce* agreed to surrender, provided it was not relieved within a certain time, and gave hostages for the performance of his agreement. In the mean while *Knollys* returning from Brest, sent word to the French commander (who waited without hostility, the expiration of the time appointed,) that he would not keep conditions made in his absence by a person who had not sufficient power, and bade him retire or he would attack him. The French replied that they would keep on the defensive till the end of the period fixed for delivering up the castle, and they should then know what part to act. The points of difference in this curious case, which was plainly a *Sponsio*, as it is called by writers on the law of nations, are not now before us;

(s) Heifs. Hist. d'Allemagne I. 112. an. 1197.

(t) Froissart, v. I. ch. 320.

we have merely to mark the fate of the *hostages*. Upon the expiration of the term, *Knollys* persisting to keep the castle, the duke of *Anjou* who had taken the command of the siege, and who, according to the historian from whom I extract this account, was as brave and generous a prince as any in Europe, was embarrassed what to do with the hostages he had received, and asked the advice of *Garcias du Chatel*. The latter, "who knew what humanity demanded, not less *than what the law of arms awarded*," told him that *although the rigour of war gave him the right to put these unfortunate men to death*; yet as it was not their fault that *Knollys* continued obstinate, it would be more merciful to restore them. The duke acquiesced, and *du Chatel* conducted them out of the camp. In this state of the affair, he was met by *OLIVER de Clisson*, one of the French generals, and surnamed, for his severity, the *butcher*, who brought back the hostages to the duke, and represented to him that by this ill placed mercy he only encouraged the enemy to break their faith. By this, and other strong arguments, he obtained from him the power of doing as he pleased with them, and the unhappy men accompanied by an executioner, were instantly led down to the side of the castle ditch, where *Knollys* was summoned to a conference. He appeared at a window, and *Clisson* shewing him his friends, asked him if he would suffer them to die for his breach of faith. He replied that he was guilty of no breach of faith, that the blood of these innocent men would therefore be upon the head of *Clisson*, who would thus well earn his surname of *butcher*, and that if he persisted, he knew how to retaliate. (u) The savage *Clisson* executed

(u) The other particulars of *Knolly's* answer are a curious mark of the resignation that was expected from hostages in those days. "Robert Knolles repartit, les gentiz hommes que vous  
" tenez



executed his threat, (to the regret, adds Froissart of all the army, two hundred of whom wept for their deaths,) and on the instant a scaffold was seen pushed out from the window where *Knollys* had appeared, and four French gentlemen being brought forth, were beheaded on the spot, and their heads and bodies thrown down into the ditch among their friends. Such were the particulars, and such the exactness of cruelty, in a case by no means incurious in the laws of war as admitted by our ancestors. (v)

Another great point which peculiarly marked the want of regularity and order which formed the character and the disgrace of the times, was that liberty which individuals claimed to do themselves right, upon foreign injury; and their consequent danger of falling into the extreme of disorder.—The Kings and Magistrates of the time, had seldom the power, and not always the disposition to exert one of the most important functions of the Sovereignty committed to their hands, namely the defence of their subjects from external insults; and in this weakness, or this indolence, they allowed the martial spirit of the age to take its course, and the private subjects of different monarchs waged very cruel wars against one another, for a considerable length of time, without calling out the force of their respective nations in their defence. I speak not here of the famous *private wars* of the Barons, which were the consequences of actual Sovereignty, and will be

“ tenez font mes amis il est vray, et il n’y’a rien que je ne donne  
 “ naïse pour les sauver de votre inhumanité; *mais ces amis sont*  
 “ *généreux*, et ils aiment mieux mourir que de m’obliger à faire  
 “ une chose honteuse, comme celle de me rendre sous prétexte  
 “ d’un traité nul et invalide.”—Vie de Bert. du Guesclin. 246.

(v) Ib. & Froissart, v. 3. ch. 6. The latter says *Knollys* (or *Canole* as he calls him,) executed *all* his prisoners.

fully



fully reviewed under another head, (w) but those heterogeneous depredations which were so often suffered *by way of Reprisals*.

Reprisals, under proper control and attention, come regularly within the scope of the Law of Nations as observed at present; and although I am aware that there is a great authority for the contrary opinion, (x) yet it is upon the whole settled, that no *private* hostilities, however general, or however just, will constitute what is called a legitimate and public state of war. (y) So far indeed has my lord Coke carried this point, that he holds, if *all* the subjects of a king of England were to make war upon another country in league with it, but without the assent of the king; there would still be no breach of the league between the two Countries. (z)

In the times before us various were the instances in which individuals possessing no public character, and authorized by no public commission, assumed, and were almost encouraged to assume, the province of redressing the wrongs that were offered them from without. I will select one, which was not less remarkable for the account which it affords us of the sentiments of our ancestors, than it was important in the end, by involving the whole force of two mighty nations in a serious war.

In 1292 two sailors, the one Norman, the other English, quarrelled in the port of Bayonne, and began to fight with their fists. The Englishman being the weaker, is said to have stabbed the other with his knife.—It was an affair which challenged the intervention of the civil tribunals, but being neglected by the Magistrates, the Normans applied to their King, (*Philip le Bel*) who with neglect still

(w) Chap. XII. On the Influence of the Feudal System.

(x) De Witte.

(y) Vattel, L. 2. ch. 4.

(z) Fourth Inst. 152.

more unpardonable, *desired them to take their own revenge.* They instantly put to sea, and seizing the first English ship they could find, hung up several of the crew, and some dogs at the same time, at the mast head. The English retaliated *without applying to their Government*, and things arose to that height of irregularity, that (with the same indifference on the part of their kings, the one nation made alliance with the Irish and Dutch ; the other with the Flemings and Genoese. *Two hundred* Norman vessels scoured the English seas, and hanged all the seamen they could find. Their enemies in return fitted out a strong fleet, destroyed or took the greater part of the Normans, and giving no quarter, massacred them, to the amount of fifteen thousand men. The affair then became too big for private hands, and the Governments interposing in form, it terminated in that unfortunate war, which by the loss of *Guienne* entailed upon the two nations an endless train of hostilities, till it was recovered. (a)

While such laxity of discipline and of true subordination prevailed, we can little wonder if the passions of private individuals were allowed to enter into, and mingle with the public administration of the laws of war. When any one therefore had distinguished himself in zeal, or severity, or skill in the destruction of enemies ; far from respecting him, he was sometimes marked out for a vengeance, which extended itself even to innocent persons. Thus when *Geoffry Payen*, a French Captain, had been taken by some English troops in the wars of EDWARD III. they at first contented themselves with requiring him to follow them to the town of *Benon*, whence they had sallied ; but upon questioning him, and learning that he was in the service of de CLISSON their mortal enemy, they then replied, “ Il faut

(a) Heming. 39, 40. T. Walsing. 58, 60. Velly. 4. 31, 32.

“ mourir, puis que tu es a ce traistre *Cliffon*, le plus  
 “ cruel de nos ennemis. La dessus, en haine de son  
 “ Capitaine,” continues the history, “ ils tuerent ce  
 “ brave Gentillhomme, ou pour le moins laisserent  
 “ pour mort.”—In return for this, De Cliffon took  
 an oath that he would not ransom any prisoners for a  
 whole year, but would put every one to death who  
 fell into his hands. (b)

In these times also, there existed a custom in full  
 vigour which is to be traced to very remote antiqui-  
 ty, but which the mildness of modern improvements  
 seems to have totally abolished ; I mean the practice  
 of exacting *ransoms* for the liberty of prisoners.

Originally, from the supposed right of putting  
 captives to death, it was held lawful to reduce them,  
 as an act of mercy, to perpetual slavery ; of which  
 in the preceding chapters we have selected various  
 instances ; nor was the practice wholly worn out,  
 even so far down as the fourteenth century. *Lewis*  
*Hutin* in a letter to *Edward II.* his vassal and ally,  
 desiring him to arrest his enemies the *Flemings*, and  
 to make them *slaves* and *serfs*. (c) Men however  
 who made war for booty as well as from a thirst of  
 vengeance, were soon willing to exchange a prison-  
 er whose life might be burthensome, and whose  
 death was indifferent to them, for advantages more  
 convenient and manageable. Accordingly, even  
 the *Scandinavian* and *Scythian* nations, whose passion  
 for slaughter so often makes us shudder, condescend-  
 ed at last to accept of ransom for their captives ;  
 and during the ages we are examining, the custom  
 appears to have grown universal and been regulated  
 by fixed and known rules. The chief among them  
 seems to have been, that the prisoner should remain

(b) *Vie de Bert. Du Guesc.* 224, 225.

(c) “ Mettre par deveres vous, si comme forsaiz à vous, *Son*  
 “ et *Esclaves a touz jours.*” *Rymer* 3. 488.



the property of him who had the fortune to take him, though in some instances the king, as best able to judge of the expediency of giving liberty to particular enemies, claimed a right to retain them himself, at a price much inferior to that which the captor might have expected. It is said by a French antiquary, that the king of France had the privilege of purchasing any prisoner from his conqueror on the payment of 10,000 livres; (d) and it is remarkable that the money paid by EDWARD III. to *Denis de Morbec* for his prisoner JOHN king of France, taken at *Poitiers*, amounted to that precise sum. (e) Edward afterwards exacted three millions of gold crowns, amounting, it is computed, to 1,500,000l. of our present money, for the liberty of his illustrious captive, (f) and a kind of reproach on such an immense disproportion, escapes from *Villaret* in this part of his history. (g)

The reproach is unmerited. However just it might be, according to the maxims of the time, that the conqueror should be rewarded for his valour and address in capturing a potent or dangerous enemy; the power of giving him liberty at pleasure, might have been very prejudicial to the state; and as every soldier fought for the good of the common weal, as his own; it was not a debt of justice to give him the whole, or even the greater part of the profit upon the prisoner. In the case of *John*, whole Towns and Provinces were yielded up to the state, besides the immense sum above-mentioned: it cannot be supposed that *De Morbec* had any right to these! It was probably upon such principles that *Henry IV.* forbade the *Percies* to ransom their prisoners taken at

(d) Pasquier recherches de la Fr. L. 4. ch. 12.

(e) Villaret i. 248. (f) Id.

(g) Hist. de Fr. i. 248.



Holmdown. They were the most illustrious of the Scotch nobility, and the king perhaps in retaining them, had views of state which looked much farther than the mere advantage of their *ransom*. He seems to have published this prohibition to the *Percies*, in consequence of his prerogative, and though the proclamation acknowledges their right, (*h*) yet by his haughty perseverance in the exertion of his claim, he drove that powerful family into their famous, and, to themselves, fatal rebellion. (*i*)

It was thus however, for the most part, in the option of the persons in possession of a prisoner, whether or not to ransom him, the prisoner having no right to insist upon his liberty, however great the advantage he might offer in exchange for it; and in this, they were governed by motives of policy, drawn from his personal importance. ENTIVS king of *Sardinia*, the son of the Emperor FREDERIC II. was of such consequence to his father's affairs, from his activity and services, that upon being taken prisoner by the *Bolognese* army in 1248, no ransom that could be offered was able to obtain his liberty, and he died at the end of a captivity of four and twenty years. (*k*) CHARLES V. of France, pursued the same conduct towards the famous *Capit* of *Bucche*, whom he purchased of the gentleman who took him for 1200 livres, (*l*) and shut up in the Temple at Paris, refusing every offer made to him by *Edward III.* for the liberty of an enemy he so much feared. (*m*) Upon the same principle, it was the dying injunction of HENRY V. not to release the duke of ORLEANS and the Comte d'Eu who had been captured at *Agin-*

(*h*) Rym. 4. pt. 1. p. 36.

(*i*) Rapin Thoy. v. Sub. an. 1403.

(*k*) Heiss Hist. de l'Emp. 1. 127. Pfeffel Droit Pub. d'All. 1.

398.

(*l*) Froiss. v. 1. ch. 311. 328.

(*m*) Id. v. 1. ch. 328.

court,

court, till his son, then an infant, was capable of governing; (n) nor were those noblemen allowed to ransom themselves till seventeen years afterwards.

(o) When reasons of state however did not interfere, the general rule before mentioned, took place, and the conqueror made what profit he could of his prisoner. *Froissart* speaking of the consequences of the battle of *Poitiers*, says, those who had taken prisoners made as much of them as they could, “ car a  
“ celui, qui prenoit prisonnier en la bataille, de  
“ leur coste le prisonnier estoit sien, et le pouvoit  
“ quitter ou ranconner a sa volonte. He adds that the English became very rich in consequence of that battle, as well by ransoms as other plunder. (p)

In a rencontre between a Scotch and English knight, the same historian says, the former pursued the latter, et pour *vallance et pour gaigner*, and indeed according to M. Sainte Palaye (q) the ransom of prisoners was one great mean, by which the knights of old times were enabled to support the magnificence, for which they were remarkable.

In the next century, the right continued the same, and by the articles of war established by *Henry V.* previous to his invasion of France, it was determined that “ be it at the battle, or other deeds of arms  
“ where prisoners be taken, who that first may have  
“ his *faye* shall have him for his prisoner, and shall  
“ not need to abide by him.” (r) Mr. Barrington understands *faye* to mean the promise given to his captor by the person taken, that he would remain

(n) Rapin. sub an. 1422.

(o) Villar. Hist. de Fr. 4. 129. 131.

(p) Froiss. v. 1. ch. 166. & v. 3. ch. 128.

(q) Mem. sur la Chevalerie 1. 309.

(r) MS. collect. of Petyt. preserved in the Library of the Inner Temple.

his prisoner, (s) in which he is supported by various passages in the French historians, “donner sa foi,” being the term made use of when a person agreed to remain captive. (t)

It is not unreasonable to suppose with the author last mentioned, that the price of a man's ransom was, in general, one year's revenue of his estate, (u) and the reason which he assigns for it is farther supported by the custom of allowing men one entire year of liberty, in order to procure the sum agreed upon. In these his endeavours he was also considerably assisted by the provisions of the feudal law, which flourished in the height of its vigour during the ages before us, and by which, every vassal or tenant was obliged to assist his lord with a sum propor-

(s) Observat. on the more ant. Stat. 391.

(t) Thomas Vercler taken by a French Esquire at Poitiers, Froissart says *La lay creanza il sa foy, que récoux ou non récoux demeroit son prisonnier*, v. 1. ch. 163. The Esquire received 6000 nobles for his ransom, and is said to have become a knight in consequence of this his accession of fortune.—*Bertrand du Guesclin* surrounded by the English at the battle of Auray, CHANDOS called out to him to surrender, and Bertrand “luy donna sa foy, et fut son prisonnier.”—*Vie du Bert. du Gues.* 79, Joan d'Arc being beaten in battle, saw the Bastard of Vendome near her “à qui elle se rendit et donna sa foy.”—*Mouftrel.* ad an. 1430. So also at the battle of Agincourt, the duke of Alençon was killed in the moment when he had surrendered, and the king *vouloit prendre sa foy*. *Id.* v. 1. ch. 148.

(u) Montluc in his Commentaries speaks thus of the ransom he expected from Marco Antonio a Roman knight. Il me va en l'entendement que facilement je prendrois prisonnier ce seigneur, et que si je le pouvois attraper, j'étois riche à j'amaïs, car pour le moins j'en aurois quatre vingt mille écus de rançon qui estoit son revenue d'un an; en n'estoit pas trop. From this it should seem that there were settled terms upon which the captor and prisoner treated, and that they generally agreed at the rate of a year's income, qui n'estoit pas trop. (See Sainte Palaye, *Mem. sur la Chevalerie*, 1, 309, 365.)

tionable



tionable to the land he held, in order to redeem him from captivity. (*w*)

The sums however which I find to have been taken of different prisoners vary perhaps more than the proportion of their revenues; personal consequences as was before observed having no doubt much weight in determining the value. BERTRAND DU GUESCELIN, who had no estate at all, valued his own ransom at 100,000 livres; (*x*) the ransom of a king of *Majorca*, of the royal house of *Arragon*, about the same period, amounted to exactly the same sum; (*y*) and DAVID king of Scotland, after eleven years captivity, paid 100,000 marks for his liberty. (*z*) The queen of *Edward III.* who may be said almost to have commanded at the battle of *Durham* where he was taken, required him of JOHN COPLAND the officer who actually made him prisoner; but knowing his value he positively refused, on the plea *that no one had a right to demand him but the king.* EDWARD sent for him to *Calais*, where partly as a reward for his gallantry, and partly in acknowledgment of his claim, he endowed him with 500l. a year in land, and made him a knight banneret. (*a*) CHARLES of *BLOIS*, captured in this period of military glory for England, agreed to pay 700,000 crowns for his ransom, and left his two sons hostages for his good faith. (*b*) The famous MICHAEL de la

(*w*) Feud. L. 2. tit. 24. Hence the ransom of a king who was always at the head of the greatest number of vassals, would naturally amount to the greatest sum. Mr. Barrington who, had he pursued his communications on this subject, would have rendered this part of our work unnecessary, has quoted some ancient lines (*Observ. on the Stat. 391.*) relative to *Hinckston Hill*, in *Cornwall*, supposed to be full of copper.

"Hinckston Hill, well wrought,

"Is worth a king's ransom, dearly bought."

(*x*) Vie de Bert. du Guesc. 137.

(*y*) Froissart. v. 1. ch. 99.

(*z*) Rym. 5. 65, 68.

(*a*) Rym. 5. 542. & Froissart, 1. 139.

(*b*) Rym. 5. 862.



POLE, duke of Suffolk, paid 20,000*l.* sterling when no more than a simple knight. (c) The duke of Alençon paid 200,000 crowns, for which he was forced actually to sell a part of his estates to the duke of *Brétagne*. (d) Even the lowest caprice sometimes governed the demand, where money was not a great object. LEWIS XI. having taken WOLFAING POULAIN, an officer of confidence of MARY of BURGUNDY, insisted upon some famous hounds belonging to the seigneur de *Bossu*, as the only ransom he would take. *Bossu* at first would not part with his dogs; the king was obstinate, and a number of couriers passed between the parties on the subject, which was made an affair of state before it was settled. (e)

When such immense advantages were to be made of the persons of men of consequence; to take prisoners became a very primary object with those who went to war; and it operated well for humanity in one respect, by saving many gallant lives which might otherwise have been forfeited.

That they were forfeited in default of ability to pay, appears but too clearly in various examples. In 1441, which is far advanced in the period before us, the English prisoners taken at *Pontoise* were brought to Paris by CHARLES VII. a prince remarkable for mildness in that age. They were chained by the neck like dogs, and exposed nearly naked to the gaze and exultation of the populace. Those who could pay their ransom, were then set free; those who could not, who were by far the greater number, were bound hand and foot and precipitated

(c) Speed. 675.

(d) Villaret 3. 589.

(e) Garnier Hist. de Fr. 2. 23. By this time also it perhaps had grown into a custom to release the first prisoner made after the commencement of hostilities, without ransom. "Le Roy d'Angleterre commanda qu'on donnast congé à ce Valet, *parce que c'estoit leur premier prisonnier*."—Commines, L. 4. ch. 7.

into the Seine. (*f*) So little had the laws of war gained since the time of the *Avars*, who eight centuries before, had committed precisely such an act. (*g*) Under the reign of LOUIS XI. the same fate, and for the same default, was experienced by the inhabitants of *Liege*; (*h*) and HENRY V. when he ordered the deaths of his prisoners upon the alarm after the battle of *Agincourt*, saved those only from whom he expected considerable ransoms. (*i*)

Its effects however in another respect were disadvantageous, in so far as that it held out improper motives for war, and temptations, when war was declared, to commit violence and treachery.

The English are represented by Commynes, as always desirous of a war with France, from the recollection of the riches they had so often acquired, not only by the plunder of Towns, but the advantages made of numbers of princes and lords whom it had been their fortune to take (*k*). The same disposition, and proceeding from the same motive, is mentioned by Hollinshed under the reign of Richard II. (*l*) The seizure already mentioned of *Richard I.* and *James* of Scotland, in times of peace, were perhaps owing in part to the avarice of the Captors. In 1387 OLIVER de CLISSON constable of France, being with *safe conduct* at the court of the duke of *Bretagne*, between whom and himself there had been old hatred; was shut up in a tower, into which he had entered at the duke's desire to examine its strength. He was at first ordered by the savage Breton to be tied in a sack and thrown into the sea;

(*f*) Monstrelet ad an. 1441.

(*g*) See Chap. VIII.

(*h*) Garnier's Hist. de Fr. i. 169.

(*i*) Rapin.

(*k*) Commynes, L. 6. ch. 2.

(*l*) Vol. II. ad. an. 1383. Hence also the sturdy Hotspur is not unnaturally represented in his dreams to be talking of "Prisoner's ransom, as well as of soldiers slain."—First P. Hen. IV. Act. 2. Scene 6.

but the latter being troubled in conscience, was afterwards glad to find his orders had not been executed; notwithstanding which, CLISSON was not released but upon a treaty of ransom for 100,000 livres. (m) During the wars of PHILIP and EDWARD III. there arose many a soldier of fortune, in other words freebooters, who no doubt were encouraged in the profession by the hope of making money by ransoms. CROQUART, a famous leader of what was called the companies, is described as having become extremely rich by ransoming castles and towns, which, as he was then in the service of no state, he could have had no right to attack.

In 1367, several knights of *Suabia* having associated to perform deeds of chivalry, were tempted to use their power for the very destruction of the good order they had sworn to support. A rich Count of *Wirtemberg* residing in security at his castle at *Wildbad*, it came into the heads of these knights that they could procure a noble sum of money for the ransom of him and his family; and for this purpose, headed by a Count *Eberstein*, they attacked him, though without success. (n)

A fuller and more regular case appears in the conduct of *Thomas of Canterbury*.

While the duke of *Lancaster* besieged *Dinant*, in *Brittany*, a suspension of arms was agreed upon, during which the soldiers of each party had free liberty of ingress and egress, at their respective stations. One of the brothers of *Bertrand du Guesclin*, taking advantage of this, was exercising his horse in the fields, when he was met by a knight called *Thomas of Canterbury*, who seeing him richly dressed and well mounted, and finding him to be a bro-

(m) Froissart. v. 3. ch. 57.

(n) Spittler's Hist. of Werten quoted by Putter. B. 3. ch. 3.



ther of *Bertrand's*, immediately seized him and demanded a thousand florins of gold for his ransom. It was in vain that the prisoner urged the truce in his defence.—*Canterbury* persisted, and *Bertrand* coming into the camp to complain before the duke of *Lancaster*, he asserted roundly, that the capture was legitimate according to the rules of honour, and that he would prove it body to body. The duke, instead of preventing the combat, and giving liberty to the prisoner, was judge of the lists; and it was not till *Bertrand* was victorious that his brother was restored. (o) In this case there could now be no difficulty, and nothing proves more fully than the circumstances related, the crude and irregular ideas of justice which were entertained during these times. No serjeant of a modern army, but would have condemned a man in the first instance, who had behaved like this lord *Thomas of Canterbury*; yet notwithstanding the representations of *du Guesclin*, whose genius in the laws of war went beyond that of his cotemporaries, a battle was to be fought, and much ceremony gone through, before the commander in chief, a prince of royal blood, and eminent, according to the account, for his knowledge in those laws, could act with decision. Though justice was at last done, it was only the consequence of the success of the injured party, and it is remarkable that the whole conduct of the duke of *Lancaster* is praised as a noble example of honour. (p)

The avidity with which men fought for prisoners made it also often dangerous to the conquered parties themselves. A man of consequence known by his arms, was not only marked out above the rest during the battle, but became an object of scramble and contention afterwards. At *Poitiers* the king of France

(o) Vie de Bert. du Guesclin. 32. et inf.

(p) Id. Ib.



was nearly torn to pieces by the soldiers, who claimed him as the great prize that was to enrich them. He was quickly carried off from *Morbec* his captor, and the cry of "It was I that took him!" resounded among all who were near him. Thus pressed, he was forced to cry out to them, "Gentlemen, gentlemen, lead me quietly to the prince of Wales, and do not quarrel about me, for I am of sufficient consequence to make you all rich." (g) In this situation he was found by the earl of Warwick who was sent to enquire for him, and who rescued him from the crowd. At the battle of the Bridge of Luffac, *Carlouet* the French commander, fell into the hands of five or six soldiers who disputed so warmly about his possession, that to end the difference they were fairly going to kill him, when he was taken from them by an English knight. (r) At the battle of *Agin-court* eighteen French gentlemen had entered into an agreement to direct all their attacks against king HENRY, (most probably with the view of acquiring a fortune by his capture,) and hence one reason why the heat of battle was greatest about his person. The eighteen gentlemen perished in their attempt. (s) *Charles de Beaumont*, seneschal of St. Die, is said to have died of regret at losing the great ransom he might have gained had he taken the duke of *Burgundy* prisoner at the battle of *Nanci*, instead of killing him as he did, without knowing who he was. (t)

I cannot quit this subject of ransom, though the account of it may appear already but too long, without observing that the value of a prisoner's liberty was considered as a species of wealth, and regular-

(g) Froissart, v. i. ch. 164. Seigneurs, Seigneurs, menez moi courtoisement, &c.

(r) Vie de Bert. du Guesc. 201.

(s) Chron. de Fr. ad. an. 1415.

(t) Commines, L. 5. ch. 10. n. 3. Garnier Hist. de Fr. i. 389.

ly transferred from one to another like any property. In older times, as we have seen, the prisoner was actually a slave, and sold as such according to his qualities and accomplishments. In the ages before us, he was sold, not on account of his personal utility, but his ability and willingness to pay a certain price for his freedom; or the value of which his detention was to the buyer. Hence instead of being allowed his liberty in order the better to perform the functions of a servant, it was the business of those who possessed him to keep him under close guard. COEUR DE LION was sold, to use the expression of his Ambassador at Rome, like an ox or an ass, (u) to the Emperor, who wanted to make money by his ransom: and PHILIP AUGUSTUS was long in treaty for him, in order to get rid of a powerful and irreconcilable enemy. Lewis XI. bought the bastard of Burgundy, taken prisoner by Rene duke of Lorraine, for 10,000 crowns. (w) He had before that, bought William of Chalons prince of Orange, of the Sieur de Crofle, who had taken him prisoner, for 20,000 crowns, and as the prince was not able to repay him, required the sovereignty of his whole principality in exchange for his liberty. The possessors of the famous Pucelle, sold her to the English for 10,000 livres and a pension of 300; (x) and the earl of Pembroke, being taken prisoner by Henry king of Castile, was paid over, (his ransom valued at 120,000 livres) to du Guesclin, in part of the purchase money of some estates which that General had sold. The ransoms of several other English prisoners were sold at the same time for these Spanish estates. The money for the Earl however, as that nobleman was ill when he was transferred, was not to be paid

(u) Ac si bos esset, vel asinus, vendidit.—Mat. Par. ad an. 1194.

(w) Garnier, i. 335. (x) Pasquier, Recher. de la Fr. 4. 12.

by his Bankers at Bruges, till he should be *wholesome* and *plump*, “Quand il seroit sain et en bon point.” Unfortunately for *Du Guesclin*, Pembroke died before he left France, and thus, says Froissart, the Constable lost his money. (y) Hence it appears that in these transfers, the receiver of the prisoner took upon himself the risk of losing him, and in case of death before payment, had no demand upon the person who sold him.

Ransoms were sometimes transferred as presents instead of money, which appears in the case of one of the family of *Blois*, presented by RICHARD II. to the duke of *Ireland*, who sold him to *Oliver de Clisson* for 120,000 livres. (z) It should seem also that when any doubt arose concerning the prisoner's willingness or ability to pay, *securities* might be taken as in the regular transactions of barter and sale; and this was the case of *Henry* Duke of *Brunswick* in 1404, who being taken prisoner by the Count *de la Lippe*, was ransomed for one hundred thousand crowns, part of which was paid by the *securities* which he gave on that occasion. (a) In cases, however, which occurred within the Empire, its Chief claimed the right of annulling such agreements, which in the above transaction was actually done on the plea of a defect in the cause of the war between the parties, by the Emperor Robert. (b)

But the strongest example of regularity in transfers, and that, in a case when the captive was not a prisoner of war, is shewn in the transactions concerning *Zizim*, brother of *Bajazet*, Emperor of the Turks. That prince who had pretensions to the throne, and had been beaten in battle by the Sultan, fled for refuge to the knights of Rhodes. The knights fearing to draw down upon them all the forces of *Bajazet*,

(y) Froissart, v. 1. ch. 320.

(z) Villaret 2. 220.

(a) Puffend. Introd. 3. 289.

(b) Rimius. Mem. de Bruns. 169.



transferred him to the king of France, *Lewis XI.* who notwithstanding his superstitious passion for relics, refused the offer of all that could be found in the eastern Empire, in exchange for him, and carefully kept him in custody for the knights. Seven years afterwards, it being necessary to obtain the favour of the Pope, *CHARLES VIII.* yielded him to the See of Rome, and while he was on the way, refused the whole kingdom of Jerusalem which *Bajazet* offered to conquer for him in exchange for this important prisoner. He continued at Rome six years longer, and then was transferred back again by treaty to the king, who wanted to make use of him in his wild projects upon *Constantinople*. The last sale however, if I may use the expression, was *fraudulent*, since he was supposed to be poisoned before his redelivery to the French, and died soon after. (c)

Such are the most prominent features of this remarkable custom, which was universal in Europe during these ages, but which has now wholly disappeared before the milder usages introduced by modern refinement. Captivity, in the present times, lasts no longer than the war which occasioned it; prisoners are still exchanged, as formerly, one against another, but at the end of hostilities, those which remain on either side, are set at liberty without ransom. The old practice is now found to exist only in transactions with the Mahometan nations.

(c) *Commines*, L. 6. ch. 10. L. 7. ch. 15.



## C H A P. X.

## IMPROVEMENT OF THE LAW OF NATIONS.

**ALTHOUGH** the sketch which has been given of the maxims which governed the intercourse of States during these times, exhibits for the most part strong proofs of barbarity and disorder; the natural tendency of men towards improvement, had now begun to disclose itself. There were many causes for this which must be obvious to the reader of historical observation. The Storehouse of the North had been for some time exhausted; the eagerness of desire after new habitations was at an end; and though the thirst of conquest continued, war was no longer the signal for those exterminating ravages which swept away whole nations before the victors.

It was to the mighty and comprehensive genius of Charlemagne that Europe owed her first improvements; and though his immense Empire split into fragments immediately upon his death, yet from his time the western nations began to assume the outlines of that form and of those political institutions which they at present wear. The aspiring vigour of this wonderful man did more for the world than the exertions of whole ages before him. It extended every where the advantages of **CHRISTIANITY**; it improved the means of communication; it gave cities and a police to the forests of Germany; and, what was a decisive importance, it unveiled the shores of the Baltic, whence a torrent of Savages had perpetually poured down upon the nations who were then struggling into order. The geography, and the resources  
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of the north came thus in some measure to be known; men were freed from the constant fear of extirpation in which they had lived; and, encouraged to become stationary, they were as wishful to preserve and regulate their conquests, as they had before been furious to extend them. Two centuries more, reared up the seeds which CHALEMAGNE had sown; and (notwithstanding the irregularities that have been described,) from the beginning of the eleventh century downwards, we find an evident change in the face of Europe.

By this time the different nations had assumed the appearance of a comparative union. Alliances among sovereigns were frequent; their independence and rights were tolerably well marked out; and though when engaged in war, their old barbarism was but too plainly to be discovered; yet their various modes of connection, and the customs which governed their intercourse, presented a regularity of shape and feature which had been before unknown. A strong proof of this appears in the custom which began to be pretty general about these times, of *appealing* to neutral powers, when difference broke out among them; and this not only with a view to engage their assistance, or mediation, but also from their idea that the connections among them were so close, and their governing principles so much the same, as to render it necessary to lay before them the justice of their cause.

In 1176 we have a remarkable instance of appeal and mediation in the course of a contest between the kings of *Arragon* and *Navarre*. By the deed of compromise made between them, they each of them deposited four castles, as a pledge that they would abide by the determination of HENRY king of England. Each party was to send Ambassadors to receive his Judgment by a certain day; in the case of sickness, captivity, or death, they were to wait each

others arrival for thirty days beyond the time appointed; and then, in default of appearance, the castles of him from whom the delay came, were to be forfeited to the other; but in the case of the death of HENRY, the Ambassadors were to proceed (subject to the same agreement,) to receive the judgment of the king of *France*. (a)

Not a hundred years after this, the just SAINT LEWIS sat in judgment upon the whole cause of difference between HENRY III. of England, and his barons. He had been chosen their umpire in form, and each party, the king and Queen in person, attended him in all due solemnity at *Amiens*. Nor did he consider the power thus given to him of a trifling nature; he proceeded to the most important acts of authority; and in the name of the Holy Trinity, annulled the famous constitutions of Oxford; decreed the restoration of the fortresses which had been put into the hands of the twenty-four barons, or rather Regents, of the kingdom; and finally ordained that the king should be restored to all his legitimate rights. (b)

In the same century, the famous quarrel between the Emperor FREDERICK II. and the See of Rome was discussed in appeals and letters to the chief potentates of Christendom, as well as by arms. The letters of the Emperor, particularly those to the king of England, are long and argumentative, and breathe the very spirit of a modern manifesto or state note. (c) In 1334 a treaty having been entered into by the king of *Bohemia* and other princes of *Germany* with the duke of *Prabant*, under the mediation of PHILIP of VALOIS, the latter styles himself at the

(a) Rymer. 1. 43.

(b) See these and a number of other articles of no less importance.—Mat. Par. 992. & Spiceleg. Vet. scrip. 643.

(c) Literæ Fred. ad. Amicos. M. Par. 490. 496. 520. 527.



head of the deed—"Nomme et eleu juge traicteur, "et aimable compositeur, entre hauts hommes nos "chiers amis," &c. (*d*)

But the most regular appeal which in those days appeared, was that published at Westminster by EDWARD III. against JOHN of France in 1356. It is addressed to the Pope, to the Emperor, *and to all the princes, lords, and people of CHRISTENDOM in general.* He complains that people of that age wish to palliate their own faults by blasting the innocence of others; and he therefore believes it a duty he owes to God and to humanity, to paint the king of France in his proper colours. He also justifies the king of Navarre from the infamy imputed to him in making a treaty to deliver up Normandy, by declaring before God and on the word of a king, that no such treaty had been made. (*e*) This was preparatory to the war which he afterwards declared against France, and no transactions or manifesto of the most regular modern state, can be more orderly or legitimate—The next century saw the same sort of custom in the appeal made by the kings of Castile and Arragon to the arbitration of LEWIS XI. king of France, in 1463, (*f*) and we shall soon have occasion to observe on a variety of other appeals; which, as they sprang from a particular source, and will be treated of at large in another place, need not be mentioned here.

Such then was a small part of the regularity of appearance, notwithstanding the instances of barbarity that have been related, which Europe assumed during the period we have proposed to examine. It arose no doubt, in some measure, from the tendency towards a certain order in affairs, which the institu-

(*d*) Preuves des Troph. de Brabant. P. 160. ap Du Mont an. 1334.

(*e*) Rymer. 5. 852.

(*f*) Villaret, 4. 459.



tions and political connections of CHARLEMAGNE had begun to generate. But exclusive of the consequences of that momentous reign, they were besides affected in the most sensible manner by a set of remarkable customs, common to all, which began to be visible about the eleventh century, and which are not more important from their effects than they are curious from their nicety. They are indeed so different from those that have been related; were so long known; and so intimately felt; that we cannot turn our view on the subject, without being struck with the visible and potent influence, which they had upon the laws of the world.

## C H A P. XI.

## OF THE INFLUENCE OF PARTICULAR INSTITUTIONS.

**A**BOUT this time, we find all the kingdoms of Europe; however distinguished from one another in race or manners; however different in their states of improvement, or marked by particular animosities; agreeing in the main, in the five following points:

I. In adopting the remarkable policy of the **FEUDAL SYSTEM**; the intricate connections to which it gave rise; and the numerous rights of mutual interference which it perpetually afforded.

II. In concurring in one general form of **RELIGIOUS WORSHIP**; and particularly in obeying one **SPIRITUAL HEAD**, whose usurpations, which first began to assume strength in this century, soon brought the whole of their temporal affairs under his dominion: and whose bigotry, ambition, or avarice, changed the very spirit of *true* Religion, and inculcated as a duty, the hatred and persecution of all those who thought differently from themselves.

We shall soon have occasion to observe the new and remarkable appearance which **EUROPE** assumed in consequence of this; and the great difference between the Laws of War among *Christians*, and Infidels, which it promoted.

III. In reviving, and even exceeding the **HEROIC AGES** of antiquity, and setting up a barrier, no less strong than splendid, against the mischiefs and injustice, which though not the immediate consequence of the **FEUDAL SYSTEM**, were fostered by it to a dangerous and lamentable degree.

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The extraordinary and beneficial effect which *Chivalry*, the institution we speak of, had upon the Law of Nations for several centuries, must have shewn themselves forcibly to every mind of common enquiry.

IV. In those frequent NEGOTIATIONS, TREATIES, and POSITIVE CONVENTIONS, so peculiar to the *European Nations*, with all their numerous train of the *Casus Fæderis*, *Guaranties*, *Alliances*, and *acquired rights*, which must of themselves alone have been able to modify any *Law of Nations* that might have existed; which certainly often interfered with the Rights of Nature; and form, what the writers call, the *Positive Law of Nations*.

V. And lastly, In endeavouring to settle a certain scale of Rank and Precedency among one another, upon principles peculiar to themselves, and the religion which united them; in marking out a difference in degree between certain titles, and particular forms of government; and consequently in forming a gradation in the pre-eminence of the various Sovereignties which composed the European Republic. This, although from the stubbornness and pride of various nations, it was hardly ever effected with accuracy, was still perpetually attempted, and attempted upon arguments and principles, of which the ceremonial of the rest of the world was wholly ignorant.

I am well aware, that with respect to three, at least, of these five points; it may be objected that they were known before the eleventh century, and that therefore the epoch we have adopted has been ill chosen. If we consider the subject, however, with any attention, the objection will lose most of its force, when we find that although these customs were known, their effects had hardly been felt. The *Feudal Law*, for example, had been long known in Europe; it has been discovered by some Critics  
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among the institutions of *Rome*; (a) and it is certainly to be traced to the woods of *Germany*. It did not arrive, however, at its full growth, till about the *eleventh century*; and though it may be said to have been universal before that period; it was not till afterwards, that it was universal, in all its mazes, in tyranny, and its vigour. (b)

In England in particular, though its outlines were familiar to the *Saxons*, it was by no means the same with that observed by the rest of the world, till after the *Conquest*.

It is well known that the consequences of the battle of *Hastings*, were not confined to the mere change of masters from *HAROLD* to *WILLIAM*. The laws of the land; the nobility of the realm; the manners and language; and the art and maxims of war, which prevailed among our ancestors, underwent an alteration during the Norman reigns, and almost during the first Norman reign, the effect of which is not even yet worn out. But if this had not been the case; had William succeeded quietly to the throne; the mere circumstance of his uniting *Normandy* with *Britain*, by which he laid the foundation for those extensive *feudal* connections on the Continent, which so entirely engrossed the nation for many hundred years afterwards; would have marked the century in question, as a most important one to this kingdom. The animosities and friendships, the numerous and intricate claims, and the thousand causes for war, to which that connection gave birth, will make it ever be considered as a very

(a) Blackst. Com. 2. Chap. 4.

(b) See Blackst. 2. 4. 5. Craig. J. Feud. Lyttelt. Hen, 2. 1. Roberts, Ch. V. 1. Henault. Hist. Chron de. Fr. rem. sur la. 2nd race. Montesq. E. des Loix, L. 30. passim. Velly Hist. de Fr. 1. Putter Const. of Germ. 1. Hume. Append. 11. to Hist. of Eng. takes no notice of the Chronology of the System. Plessel Droit pub. d'Allem. (1. 234. 288) attributes it to the *twelfth* century.



momentous æra in the history of the Law of Nations as observed by the *English*.

With respect to CHRISTIANITY, I am far from imagining that its influence on the mind was not felt long before this period; and in part it has already been touched upon. (c) Its *good* effects will still continue to be traced; but unfortunately the effects chiefly to be described, arose from the *corruption*, rather than the *purity* of the Church. It will be sufficient to remark that this was the age of GREGORY VII. the firm supporter, if not the founder of these Papal usurpations, which amounted to a tyranny the most wonderful that ever subjugated the mind of man: That this was the age which saw the commencement of those desolating wars which took their rise from zeal alone; were conducted, from mistaken principles, in a manner such as rendered the heart more stubborn than it really was; and so far, did as much mischief to the Law in question, as in other respects it had sometimes done good. This also was the age to which several distinguished kingdoms of Europe actually attribute their conversion (or at least the extension of their conversion) to CHRISTIANITY; and they were therefore only now introduced to participate in those effects upon the law, to the production of which, it will be shewn it so powerfully contributed. Paganism still existed in many parts of *Denmark*, *Sweden* and *Norway*, and in almost the whole of *Prussia* and *Muscovy*. (d)

With respect to CHIVALRY, it is acknowledged that its foundation was laid in this century; and as for the CEREMONIAL of Europe, it seemed unknown till long afterwards; and although the custom of making *Treaties* had been from old time in use; yet

(c) Chap. VIII. ad fin.

(d) Puffend. de reb. Succ. the reign of Ingo. and Introd. à Hist. Univ. 5. Chs. 1, 2. Mod. Un. Hist. 28. 460. 29. 411.

their effect upon the politics and public maxims of the world before this æra, it would be difficult to discover, if they ever had been felt.

It is, therefore with more propriety than at first it may appear, that I have reserved the consideration of the impressions made upon the Law of Nations by the five circumstances above mentioned, for the æra I have fixed upon. At the same time it may not be unnecessary to premise, that in the following investigations, such very strict attention to any particular custom has not been paid, as to confine it *exactly* within the bounds of the period proposed. In general, whenever I have found a law, or maxim, at its height during this time, I have chosen to mention it here; but at the same time I claim the liberty of searching for its commencement in the century before it, or of pursuing it to any number of years afterwards, if afterwards it should be found to exist.

The field is now wide before us; and without any particular reason for preferring it, I shall consider the different points, in the order in which they have been mentioned. And first, therefore, of the FEUDAL SYSTEM.

## CHAP. XII.

## OF THE INFLUENCE OF THE FEUDAL SYSTEM.

**I**N observing upon the effects of this remarkable and extensive Institution, it does not fall within our plan to give any regular account of its various regulations, its general spirit, its disputed points, its thousand niceties. Such knowledge must be supposed to have been already obtained by those who come to the present enquiry. To examine it would surpass the scope of this Treatise; and even if it did not, the subject has already received all the light which the labour, talents and judgment of the best heads in Europe have been able to give to it. Taking it therefore for granted, that the whole learning upon the point, is in the possession of the reader; I shall proceed merely to examine its effect upon the law of nations during the centuries when it chiefly prevailed.

That effect, it must be owned, was not visibly to improve mankind; there was not so great a difference as might be expected between the nations with whose customs we have been so much shocked, and those of the feudal sovereigns. The chief seems to have been, that the former were continually migrating; the latter had become stationary; the former give us the image of armies moving from plain to plain; the latter of armies intrenched in their camp: but war was equally the business and the delight of both, and both were bloody, insolent, and rapacious.

The superiority, however, which is always to be observed in stationary over wandering nations, came  
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at last to shew itself; and the wars of the times, although not less frequent than before, began to be conducted on a sort of principle and arrangement, approaching somewhat to a settled system. The whole life of the Barbarians was passed in arms, and almost in battle; and when to die a violent death was a religious duty; it would have been almost absurd to have required any cause for taking arms. (a) When government, however, came to be well established throughout Europe, although little attention was for a long time paid to it, yet it became a general law to require a cause for hostility; the nature of sovereignty began to be understood, and the idea of *legitimate* and *illegitimate* wars was thus by degrees adopted. On this situation of things, the feudal establishments operated with considerable effect; and, by a minute attention to their spirit and genius, we shall discover a variety of points in which the interests and connections of nations were extended and modelled in a manner sometimes advantageous, sometimes the reverse, but which, had it not been for the *feudal polity*, would never have been known.

One of the most obvious and general of its effects, was the great multiplication of the States of the world, and by consequence, unhappily for mankind; the multiplication of its causes for war.

A large portion of the Earth, governed by one head and properly civilized under one common Jurisdiction, must have fewer of these causes, than the same portion of the Earth, divided into a number of states independent of one another. In the former case, differences are accommodated by the peaceable mode of trial and sentence; in the latter, the most trifling personal quarrel, and, (if the subdivisions are pursued to any extent) the common dissensions of *private* life, become the signals for public and ge-

(a) Vid. Sup. Chap. VII.



neral hostilities. Where this therefore takes place, not only the manners of mankind, but their Law of Nations, must be considerably influenced; and such was the effect of the Feudal System upon the earlier ages of Europe.

It is the more necessary to examine the point under the present head, since none but Sovereigns can make *legitimate* war; and as the Barons' wars, form a conspicuous part in the history of these ages, we must naturally refer to that which bestowed upon them a right so important.

This privilege, then, of taking arms at pleasure, which, from the more private rank and the subordination of those who possessed it, was known by the characteristic term of PRIVATE WAR, was the most valuable right in the eyes of an antient Baron which he possessed, and one of the last which he parted with. However, it was rather modified and brought into a shape capable of producing more energetic mischief, than *instituted*, by the Feudal Law. Most barbarous nations are remarkable for the determination with which families and friends pursue and avenge their injuries, and this from a political, as well as a friendly motive. The antient nations of Germany, (*b*) as well as the Indians of America, present us every where with this custom. From the former it was derived to the different nations of Europe, (*c*) and it was not only the disposition, but the duty, of every family to avenge the loss of any of its members upon the family which had caused it. The hostilities which arose in consequence, were called FAIDÆ (*d*), FEID, or FEUD;

(*b*) Suscipere tam inimicitias seu patris, seu propinqui quam amicitias necesse est.—Tacit. de mor. Germ. C. 21.

(*c*) It continued among them six hundred years.

Henault. Hist. Chron. de Fr. rem. sur la 2<sup>de</sup> race.

(*d*) Spelm. Gloss. voc. Faida.

Du Cange. Dissertation 29 sur Joinville, p. 330.

(e) the Laws of most of the western counties not only let them pass unpunished, but, by regulating, gave them authority; and so high was this duty carried, that in many places, whoever succeeded to an Estate, succeeded to the vengeance due for the death of the last who had possessed it. (f)

As the notions of justice, however, improved, attempts were made to curtail, and by degrees to broguate this pernicious right; (g) but their success was comparatively small; and when, through the weakness of the Carlovingian Monarchs in France; (h) the disorders of the Heptarchy in England; and of the elective Government in Germany; (i) the power of Corporations in Italy; and the community of territory which was left in Spain, for every one who could conquer it from the Moors; when, through these causes, the independence of every Lord who owned a fortress, or could maintain a man in arms, was firmly established; the FAIDA was eagerly adopted, and extended into the right of Private War by all the Barons throughout Europe. (k)

(e) Hence the phrase still in use, of "Deadly Feud," expresses the extremity of hate between persons or families.

Stewart's V. of Soc. 10.

(f) *Ad quemcunque hæreditas pervenerit, ad illum Proximi, &c. debet pertinere.*

Leg. Angl. & Werinor. ap. Lindenb. tit. 6.

(g) In England, so early as the time of King Edmund. c. 941.

L. L. Edm. ap. Spelm. Gloss. et Wilkins. Leg. S.

(h) Montesqu. & Henault. ub. sup.

(i) Piesfel. Droit. pub. d'Allemagne abreg. & Putter. from the reign of Arnolph to Hen. V.

(k) With deference to that learned writer, this seems a more probable account of the rise of Private War among the Feudal Barons, than that adopted by Professor Putter, (Constitut. Germ. transl. by Dornford. B. 1. C. 7.) who contents himself with attributing it merely to the usurpation and pride of the Barons in the moments of weakness in their Kings. This, as has been observed, might have fostered and regulated it; but it surely was originally nothing more than a continuation of the FAIDA which had long been legal, and were never entirely suppressed.

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A new picture thus opens itself before us; the western world was not only divided into a variety of independent nations, governed in their intercourse by certain general customs; but each of them again was subdivided into subordinate States, acknowledging indeed some one LORD PARAMOUNT; but all of them equally independent of one another, with the greater Kings of the Earth. France, Germany, Britain, Italy and Spain, were carved out, as it were, among the Lords of innumerable Castles<sup>(1)</sup> who made War and Treaties with all the vigour and all the ceremonies of powerful Monarchs.

The Corps Diplomatiques are full of these Treaties in which nothing can be distinguished in the intercourse of these subordinate Vassals, from that of independent Kings, except when mention is made of the rights of *Lord Paramount*. Stewart and Lytton have thought it worth while to preserve several of them in their Appendixes; and a serious attention to them will sufficiently refute a marked expression of a writer whose very high authority would have possibly stopped me from proceeding in these

(1) Nothing can bring this more forcibly to our observation, than the bare recital of the number of Castles and Fortresses possessed by the Barons of various Kingdoms. In England, at a peace between Henry II. and Stephen, *eleven hundred and seven* Castles were ordered to be destroyed.—Lytton. H. II. 1. 18.—In France, upon a negotiation for peace between Edw. I. and Ch. V. in the year 1376, the Plenary Power of the French Ambassador contained a state of the fortified places they were willing to give up to Edward. They amounted to the astonishing number of *fourteen hundred* walled Towns, and *three thousand* Fortresses, in the province of *Aquitaine alone*.

Villaret. Hist. de Fr. 2. 491.

When we consider that these were not entertained for the public defence against foreign enemies, but chiefly for that protection which is now afforded by the Laws, without the assistance of a single Garrison, how much reason have we to rejoice in the changes of the times!

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considerations, had he not thrown it out as a mere *obiter dictum*. *Du Cange*, after detailing the laws which governed the custom of private war, and observing that *the right was universal among all the Western States*, observes, “Cependant cette faculté de  
 “se faire ainsi la guerre, est contraire au Droit des  
 “Gens, qui ne souffre pas qu’aucune, autre ait le pouvoir de déclarer et de faire la guerre, que les  
 “Princes et les Souverains, qui ne reconnoissent personne au dessus d’eux.” (m)

In this observation, the subject of the law of nations was not regularly before *Du Cange*; or, if he had really considered it, he neither had taken the view of it which I have done, in considering it a particular law, confined by custom to particular nations; nor had he actually considered the whole nature of Sovereignty, which has a variety of modifications that allow a feudal Vassal to be fully Sovereign *quoad* the right of making peace and war, with all but his Lord Paramount.

It is true that Charlemagne had denied them this rank, even as it related to the right of making war; and the following Capitulary tends to support the opinion of PUTTER respecting the origin of that right: (n)

“Nescimus qua pernosa inventione a nonnullis  
 “usurpatum est, ut hi qui nullo ministerio publico  
 “fulciuntur, propter sua odia et diversissimas voluntates pessimas, indebitum sibi usurpant in vindicandis proximis et interficiendis hominibus vindictæ ministerium: et quod Rex saltem in uno exercere debuerat propter terrorem multorum, ipsi impudenter in multis perpetrare non metuunt propter, privatum odium.” (o)

(m) Differtat. 22. sur Joinville. p. 342.

(n) Vide note k, page 343.

(o) Capit. carolomag. L. 5. 180.



But although, during the time of CHARLEMAGNE, the privilege might have been thought an usurpation; yet, during the succeeding ages, when the feudal system had become what it is generally considered, and had assumed that regularity of shape which it continued to wear so long; the vassals were men of very superior consequence to that which they had before enjoyed; and, as far as it relates to the right of war *with one another*, were not to be distinguished from States the most independent. Hence therefore, when PHILIP AUGUSTUS proposed to RICH. I. in a treaty of peace, that their barons should be prevented from making war upon one another; it was refused by Richard, “ *Quia videlicet violare nolebat Consuetudine & Leges PICTAVIÆ vel aliarum terrarum suarum, in quibus consuetum erat ab antiquo, ut Magnates, causas proprias invicem allegarent.* (p)

There was this difference, however, between independent States and the subordinate Sovereigns; that the former had no common Tribunal to appeal to, and could only decide by the sword, while the latter, on the contrary, could appeal, *if they pleased*, to their Lord Paramount; and things were then decided by the judgment of their Peers. Their public maxims also among one another would, no doubt, take their character from the general Laws of their particular Nation; and as Europe consisted of a certain class of Nations, insulated with respect to the rest of the world; so the petty Sovereigns that composed any particular State, may be said to have formed a distinct class, with respect to the rest of Europe.

The accurate *Beaumanoir*, and the elaborate *Du Cange*, have detailed the particular customs attendant upon the private wars of the French Barons, in a manner that throws great light upon the subject;

and they will be our guides in much that we shall have occasion to observe relating to them. And first, with respect to the causes for War.

These could only be such crimes as would have been punished with death had the injured party appealed to the civil tribunals, what *Beaumanoir* calls “*Vilains mefaits*,” and were always some flagrant breach of the Law, as Murder, Adultery, or Treason. (*q*)

When any of these crimes had been perpetrated, war was instantly made by the family injured against that which had done the injury; for on these occasions they were governed by the spirit of the old *FAIDÆ*. All the relations, therefore, of the injured person were bound to join themselves to his standard; and every one of them not only had a right, but was under obligation to attack the possessions and the persons of every one of the hostile family. The obligation indeed was so strong, that, upon a refusal to comply, men were actually obliged to renounce their relationship, and with it all their rights of succession to family property, in a solemn and public manner, often taken notice of by the *Salic Laws*. (*r*)

But as Relationship was thus made to confer the most important rights, and to subject a person to very cruel duties, it became necessary to define with accuracy how far it should extend, so as to be brought within the meaning of the Law: it was determined at first, that beyond the seventh degree of affinity, and afterwards, beyond the fourth, where the Laws of the Church permitted marriages to commence, any one who chose to stand neuter, was not bound

(*q*) *Contumes de Beauvais. par Beaumanoir. Ch. 59.—Du Cange. Dissert. sur la vie de St. Louis. par Joinville. 29.*

(*r*) *Velly Hist. de Fr. 3. 115. Henault ubi sup. & tit. 63 of the Leg. Sal.*

to take part with his family. If therefore, prompted by affection, or a warlike spirit, he still chose to fly to arms, he was then considered as a principal, and as such, was obliged also to declare war in form; (s) so that it should seem, those who were within the degrees of affinity were not bound to comply with this ceremony after it had once been gone through, by the person who acted as principal. (t)

Such principal was called "CHEVETAIGNE," or "QUIEVETAINE," evidently the radix of the English word CHIEFTAIN, and signified a person who, to revenge an injury done to his family, declared war against the offender. (u) The forms of that declaration were solemn and worthy of imitation; they admitted also of so many modifications, that a thorough knowledge of them must have constituted no inconsiderable part of the jurisprudence of the times. They seem, however, to have been arranged under the two divisions of DEEDS and WORDS.

War was declared by DEED, when it arose on the sudden, "*Quant caudes mellees sourdent entre Gentix-hommes d'une part et d'autre*; (x) and in this case, all those who were present, were obliged to take part in it, according to the side to which they were attached. (y) It was declared by WORDS when the principals sent defiance to one another. "*Quant li un manece l'autre a fere villenie, ou arjude de son cors*." There was, however, a very material distinction between the conduct of the Relations, and that of the Principals; for the latter, being supposed to understand one another's causes for complaint,

(s) Du Cange. ut sup.

(t) Coutum. de Beauv. C. 59. Du Cange. Dissert. 29. sur Joinville p. 333. These are circumstances sufficiently remarkable, but which either escaped the notice, or did not fall within the subject, of Dr. Robertson, Introduct. to Ch. 5.

(u) Beauman. Ib.

(x) Ib. Id.

(y) Du Cange. 333.

might enter upon the war immediately after the declaration; while the former who might live at a distance, or might not be acquainted with the procedure, were allowed forty days to prepare themselves, unless they happened to be actually on the spot when the quarrel broke out; and this regulation was made by PHILIP and HARDY, according to Beaumanoir, (or Saint Lewis, according to Du Cange), (z) as the means of abolishing by degrees the whole of the practice in question. In Germany also, by what was called the *Landfriede*, or *Peace* of the Empire, (a regulation of Frederick I. confirmed by the GOLDEN BULL,) a Baron going to war, was obliged to declare himself an enemy, and give three days notice to his adversary. (a)

From this duty in the family to make common cause, it followed, that if two Brothers made war upon one another, the Law by which they were bound to assist could not take place, the family being equally related to them both, a case which was altered if the Brothers were only uterine. (b)

It is needless to observe, while treating the effects of the Feudal System, that all the *Vassals* of the Lord supported him in the war. What, however, was rather remarkable, and can only be explained by the peculiar nature of that system, they could not be attacked except while in arms, and on actual duty. As soon as they had returned home, upon the conclusion of their campaign, though the war might continue between the principals, they ceased to be parties; having barely performed the regular service required of them by the Feudal Law. (c)

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(z) Du Cange. 334.

(a) Putter. L. 2. C. 10. Golden Bull. Ch. 17. De Diffidationibus. ap. Du Mont.

(b) Beaum. ut sup. Du Cange. p. 333.

(c) Beaumanoir, Ch. 59. It is extraordinary that Dr. Folsom, whose accuracy and observation upon this subject no one can



The rights of the Individuals of the family were no less important when the difference came to be terminated, than they had been on the breaking out of the war. They were all to be consulted, and all of them had a right to put a negative on the negotiation. This negative, however, was not binding upon those who were tired of the quarrel, and were willing to make peace; and in that case therefore the persons concerned assumed new situations. He, who perhaps had been the original *QUIEVETAIN*, retired from the war; and he, who had only engaged as auxiliary, was left as principal; nor were any of his family, not even the person whose injury had been the cause of the feud, bound to assist him. But that it might be understood what was the precise situation of the parties, new declarations were to be made, in which it was known who were to be considered as friends, and who were to remain as enemies; and if without such declaration any act of hostility was committed, the perpetrator was guilty of a kind of treason, (*paix brisée*) and might be punished with a halter. (*d*)

There were three modes of terminating these differences, according as the parties could agree.—I. By making a regular treaty of peace.—II. By taking

can question, with Beaumanoir before him, has also neglected this circumstance, the importance of which as to the Law of Nations must be evident.

(*d*) Beauman. Pa. 301, et infra. The President Henault seems to have lost sight of his usual accuracy in throwing the rights of Private War and of the Duel together. Immediately after despatching upon the mischiefs of private war, he says, “Cependant ces combats eurent besoin depuis de la permission expresse du Prince; en sorte que c’étoit une crime de leze majesté de se donner Camp et Jour,” &c, (Rem sur la 2nde race.)

This and what follows evidently have reference to the Laws of Single Combat, which was a mode of legal trial, and had no connection with the right of Private War, a right enjoyed as a privilege of the Fief, and in spite of the authority of the Sovereign.

bonds of assurance from one another, to suspend hostilities, and abide the decision of a superior Lord.—

### III. By single combat.

The first, as it was not peculiar to the *Feudal System*, need not be taken notice of here. By the second, either party, (and generally, as was natural, that which was the weakest) might summon his adversary to the Lord's Court, and oblige him to give bond that he would not molest him farther, either in his person, in his family, or his goods, but bring the difference regularly before the Jurisdiction of the Court. In order to understand this the better, it must be remembered, that although two Barons, having the right of war, might, and generally did, fly to arms upon every quarrel, yet this did not destroy the power of civil tribunals. Though much neglected, they were still open, and when appealed to, did justice in the manner they best were able. None, however, but the Courts which possessed the privilege of what was called the **HIGH JUSTICE**, in other words, the power of life and death, could take cognizance of these disputes; the reason for which will be obvious when it is recollected that none but crimes which in the event of conviction could be punished capitally, were the fair and legal causes for war during that time. (e) We may imagine, however, the little efficacy of this mode of terminating differences, when the strongest party was often superior, not only to his adversary, but to

(e) Vide supra. Dr. Robertson, in his Note X, Sec. 1. *Introd. to Ch. 5.* in which abundance of learning is displayed, has been somewhat inaccurate, or rather not ample enough in his account of this matter. He contents himself with saying that Bonds were granted voluntarily, or exacted by the Magistrate, to abstain from hostilities, and that afterwards, if any were committed, the penalty of Treason was incurred. He makes no mention at all of the trial of the original difference before the Civil Courts, the very cause, probably, why it should then be considered as Treason.

the judge himself; for it depended upon the accidents of power and firmness in the Lord, whether substantial justice could ever be done. So late as the year 1224, Fowkes de Breaute, having thirty-five verdicts of disseisin past against him, let the King's Judges themselves at defiance, and *nimis inconsultè agens*, to use Matthew Paris' expression, bound them in chains, threw them into Bedford Castle, and confined them in the Dungeon; nor could he be punished according to his merits; for though his Brothers and others who assisted him, to the number of twenty-four, were hanged, he himself escaped with the milder punishment of exile. (*f*)

The third mode of terminating a private war, was by DUEL, the nature of which is too well known to need any particular discussion. We may observe, however, that although *Beaumanoir* has considered it as a separate mode, it rather seems to have been the consequence of the last, namely the Appeal of the Lord's Court; the Reader not being to be told, that even before the regular Jurisdiction, the DUEL was often the very mode of the trial.

Such is the account of the maxims of private war, as it prevailed among the Barons of France; and which, according to the System we pursue, may be not unreasonably considered as a part of the Law of Nations in this time.

But *France*, the fairest, and most extensive country of the Christian World; the Parent of so many Colonies, and even of so many Kingdoms, (*g*) could not fail to have much influence upon the maxims and manners of other Nations, and it may therefore be not unfairly supposed, that much of the genius and

(*f*) M. Par. 320.

(*g*) Of Sicily, of Naples, of Jerusalem, of Flanders, at one time of the whole Greek Empire, and in some measure of England. See the histories.

spirit of these Laws, pervaded the Feudal Polity in other parts of Europe.

In *Germany*, private war raged with universal violence; and from the elective constitution of the Empire, the consequent weakness of the Government, and the circumstance that the Papal thunders were first directed into that quarter, no efforts of the Sovereign could put an end to it till the very end of the fifteenth century, when the erection and firm support of the Imperial Chamber, habituated men to a more regular course of Justice. (*h*) Even so late as the beginning of the fourteenth century, the disorders of that country rose to such a height, that sixty cities of the Rhine, together with the three Ecclesiastical Electors, the Prince Palatine, and the Duke of Bavaria, were obliged to associate together to defend themselves against the Protectors and Relations of Robbers, on the highway, *who might use their right of war to avenge their deaths.* (*i*) Among other causes for this, there is perhaps none stronger, or which demonstrates the vices of an elective Government with greater force, than the little interest which the Emperors themselves had to support the supreme authority. As they knew that every advance to good order would weaken the power of their families, in case they did not succeed to the throne, they were the less concerned to attempt, what all the other crowned heads in Europe were perpetually endeavouring to effectuate. Hence the strong circumstance, that the Princes of the empire, who were originally nothing more than the other Barons of Europe, have continued *Sovereigns* to this

(*h*) Pfeffel. sub. ann. 1495.

(*i*) Heiff. 1. 152. Pfeffel. 1. 416. the Deed is in Du Mont. Corp. Dip. 1.



day, and may exercise the same right of war in common with all other Sovereigns. (*k*)

In *Italy*, which was at a still greater distance from the seat of Government, the Emperor lost his power sooner. The original Vassals of CHARLEMAGNE and OTHO, not only asserted the privilege of private war as a *feudal* right, but became, and are still, more independent of their Chief, than their fellow Sovereigns of Germany; and this was one of the reasons why the Kings of France allowed them to clothe their foreign ministers with the full representative character of *Ambassador*, which they often denied to the Electors. (*l*)

In *Spain*, where revenge is almost a point of honour, and forms part of the national character, the right in question may be supposed to have been carried to its height; and its abolition was also proportionably later; the regulations for this purpose having been ineffectual till the time of CHARLES V. in the year 1519. (*m*)

The history of the *northern* kingdoms, is for many a century the history of anarchy and murder; and private war flourished there but too long. In *Sweden*, it is remarkable, that it was the clergy who last possessed the means of it, and so late as the reign of GUSTAVUS ERICSEN, an act of the states was necessary to vest in the King the possession of their numerous castles. (*n*)

(*k*) Even the *Lanfriede*, or Public Peace, a fundamental constitution of the Emperor Frederick I. for the preservation of the tranquillity of the Empire; while it threatened Robbers and Incendiaries with the Ban, reserved to every one a right to do justice to himself, provided he gave three days notice to his Adversary.

Putter. B. 2. Ch. 10. Vide Sup.

(*l*) See Wicquefort de l'Ambassad.

(*m*) Robertson. Introd. Ch. V. Note X.

(*n*) Mod. Un. Hist. 29. 378. Erickson died in 1566.

But

But of all the Nations of Europe, perhaps without the exception of *Po'land*, this remarkable right existed longest in the northern parts of *Great Britain*. A HIGHLAND CHIEF was always formidable, even to his Sovereign, as well as to his neighbours, and his power and name have been dreaded in the extremity of the south.—Nor was it till late in the present century, and that in consequence of the influence of the Pretender in *Scotland*, that they received their final blow. The severity and language of the different acts that have passed against them, bespeak in strong terms, the manners and customs of this warlike people. (o)

In this universality of independence in the Barons of Europe, we may imagine that the English were not without their share; and accordingly the right in question was transmitted to them from the Saxons, and but too often exercised. They maintained courts of their own, and officers whose characters bespoke the parade of royalty under the names of Constable, Marechal, Justiciary, Seneschal, and Chancellor. (p)

The families of Northumberland, Gloucester, Warrenne, and Warwick, are illustrious for this sort of power, and of the latter, he who was known by the name of King Maker, was alone supposed to support 30,000 retainers at his different manors and castles.—We have a further strong instance of his

(o) By 1 Geo. I. Cap. 56. the being found possessed of arms in the Highlands, for the second offence was punished with seven years transportation; and only men of 400 pounds Scots, revenue, could keep *two* firelocks. Nothing is more characteristic of the spirit of private war than the inscription mentioned by Johnson, (Tour to the Hebrides, the account of Col.) upon an old castle in Scotland. “If any man of the Clan of Maclonich shall appear before this castle, though he come at midnight, with a man’s head in his hand, he shall there find safety and protection on against all but the King.”

(p) Hume’s Appendix II.

power,

power, and the spirit of sovereignty assumed by the feudal Lords, in the memoirs of Commynes. WARWICK was governor of Calais, and the town seemed little to consider who possessed the throne of England, but rather looked to him as their Sovereign. When, therefore, Commynes was sent there from the Duke of Burgundy, he found the whole Garrison in his Livery, and as a compliment had the apartment assigned for him, decorated with white crosses, (the arms of France) and rhimes, importing that *the King of France and the Earl of Warwick were good friends.* (q)

Dr. Robertson, however, observes, that the mention of private war, in England, is more rare than in other countries; (r) possibly owing to the cause he assigns of the superior vigour of the Norman Kings. The fact is certain, that though many of the Barons rose to a great height of power, there were in England none of those immense fiefs which in France, Germany, and Italy, split the monarchy into fragments, (s) nor was the unwise policy pursued, which divides the fairest portions of the kingdom into Apanages for the children of the blood royal, a measure so long destructive to the interest of other countries. (t)

We find then the right of *private war* universal throughout Europe, during the height of the Feudal System; nor were Ecclesiastics less eminent for the exercise of it than the Laity. The Clergy were pos-

(q) Commynes, L. 3. Ch. 6.

(r) Note X. Introd. to Ch. 5.

(s) Henry, the Lion of Saxony, extended his territories from the Adriatic to the Baltic, and possessed Saxony, Bavaria, and Westphalia. Heneault 1180. Puffend. Introd. 3. 271. Puter. 2.

10.

The great fiefs of *Normandy, Aquitaine, Bretagne*, and above all, *Burgundy*, were able at any time to shake the whole monarchy of France.

(t) Lancaster and Chester were the only counties Palatine which emanated from the crown, and were very quickly resumed.

lessed of Baronies in right of their Churches, and were often personally engaged in the duties which they imposed. (u) As the sacred character, however, exempted them, if they pleased, and at any rate was inconsistent with a martial one, even in a martial age, the officer charged with the management of their temporalities, succeeded to this part of them also, and was called *VIDEME*, or *VICE DOMINUS*. Like the Viscount, he soon converted his office into a fee, and by becoming the vassal of the Bishop, or Monastery, exercised the right in his own name. (v)

Having thus given somewhat at large the history of private war, modified by the Feudal System, as part of the Law of Nations during the earlier periods, it would not be at all irrelevant to our subject, if we went as largely into the means by which the custom was abrogated; and as every work should be as

(u) The Bishop of Beauvais was taken in arms by Richard I. of England. Upon being claimed by the Pope, the King sent his Holiness the bloody Coat of Mail of the Prelate, and replied in the language of Jacob's sons, "This have we found. Know now whether it be thy son's coat or no." Upon which the Pope is said to have answered, that as he was rather the soldier of Mars than the servant of Christ, he should be considered as such, and ransomed at the King's will. Holinshed. R. 1.

The Bishop of Cambray again, on the other side was taken by Philip Augustus, and the two Prelates regularly exchanged.

(v) Hence Vidame became a seignory or lordship, and was very little attributed to several French noblemen; as the Vidames of Chartres, of Amiens, &c. who held their lands of the Bishops of those places. See Pasquier *Recherches de la France*, 8. 5. Lu Conge. voc. *Advocatus*. Du Mont. 1. 93. & *Differt.* 24. sur Joinville p. 331.

The famous Thomas a Beckett, when Arch Deacon of Canterbury, followed Hen. the II. in an expedition to Tholouse, and maintained, at his own charge, 4000 Suspendiary Soldiers, and 1200 Knights, the latter of whom dined every day at his own table.

*Iytlest. Hen. II. 2. 161.*

complete



complete within itself as possible, we might be justified in laying it before the reader.

As however many of those means took their rise from the influence of *Christianity*, which we intend to treat of separately, and as the outlines of them have already been traced with much ability by Dr. Robertson, we shall content ourselves with referring to him, (x) and reserve what we have to say upon it for another chapter.

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The next great feature of the Law of Nations which the Feudal System produced, is that remarkable and intimate connection ; that constant pretence and indeed, *right* to interfere with one another, which the states of Europe mutually assumed in consequence of the divisions and subdivisions into which they had fallen. The creation of Fiefs and Arriere Fiefs, over almost all the Western countries, presents to us a picture of a few Lords Paramount, of small real power, but great pretensions ; pretensions which were multiplied, and whose intricacy and mischiefs were infinitely extended, when the larger fiefs came to be portioned out, as they were, into ten thousand petty Sovereignities, subordinate to mediate, as well as immediate Lords. By this well known, but intricate system, there was scarce a state then in existence, which could take any public measure, without more or less involving the right and interest of some other state, of which, without this system, it would have been wholly independent.—The common rights of mankind were invaded by it, and persons possessing particular countries, even though by a royal title, could not acquire certain other countries at the same

(x) Note X. Introd. to Ch. V.

time, without a breach of Law. It was thus that, from the time of the Emperor FREDERICK the Second, who, as King of Sicily, became the Vassal of the Pope, no King of that country was allowed to aspire to the Empire; or, if he did, he was obliged to renounce his kingdom; (y) a constitution which three centuries afterwards was forcibly pleaded by Francis I. of France, against Charles V. in their celebrated contest for the imperial dignity, in which perhaps we may discover the first traces of that famous European system, called the Balance of Power. (z) We have seen the same sort of renunciations in modern times, but they have been by express conventions, and in the spirit of that remarkable policy; these constitutions, on the other hand, formed a fundamental law of the two countries, and were rather in the spirit of the *feudal* customs, which authorized the Pope, the superior Lord of Sicily, to prevent his hereditary enemy, the Emperor, from aggrandizing himself in countries so near him.

A vassal could not even marry without the consent of his Lord, lest the inheritance might that way pass to his enemy, of which, among a variety of examples, there is an eminent one furnished by the reign of Saint Lewis. The Count of *Ponthieu* had agreed to marry the eldest of his four daughters, and his principal heiress, to HENRY III. of England; the parties had been betrothed, the young Countess had already been espoused by proxy, by the Bishop of Carlisle, and the Pope himself had guaranteed the alliance. But notwithstanding the affair had gone such lengths, the King of France, as superior Lord of *Ponthieu*, interfered upon the ground of the *feudal* law, and spoke in so high a tone (a) that neither his vassal, nor Henry, thought proper to go through

(y) Burigny Hist. de Sicile 2. 25.

(z) Guicciard. sub, an. 1519.

(a) Velly. 2. 348.

with the treaty. Upon the same principles it was fairly imputed as a cause of complaint to Charles, the last Duke of *Burgundy*, that he had married the sister of the King of England, the enemy of France, of which he held. (b) When we consider the immense power, and the independent Sovereignty of the Duke of Burgundy, in all other respects, (one of the greatest then known,) we must be forcibly impressed with the effect of such customs.

It is remarkable, that there was no Monarch in Europe, who, in the earlier ages, enjoyed absolute independence, and did not owe fealty to others, for some part of his dominions. For though there might be many Lords Paramount, in respect to the greater part of their territories, yet they mutually did homage to one another for other parts of them.—Thus, Scotland owed homage to England, for Cumberland, and Huntingdon; England to France, for Aquitaine and Normandy; France to the Pope, and the Empire, for Naples and Milan; the Emperors to the Empire, for their hereditary possessions; the King of Spain to the Pope, for Sicily and Naples; Sweden to Denmark, Denmark again to the Empire, and so on through an endless circle. The form of this homage was the most abject humiliation that freedom could submit to; or that pride could undergo.—The possessor of a fief, let what might be his power in other parts, was bound within a year after possession, to appear before his Lord, unarmed, ungirt, bareheaded, kneeling, and his hands held in a suppliant manner, *as if in the act of adoration*, between the hands of the superior, who was seated. In this posture he was obliged to repeat the following oath: “From this day forth to my last, *I become your man*, of life, and limb, and earthly honour; I will be true and faithful to you and yours.” (c)

This

(b) Commynes.

(c) Novus quisque in hæreditatem feudalem successor, tenetur infra annum se domino siliere, atque Inermis, Dissinctus, Nudus Capite

This degrading ceremony was continually brought into practice, and is well described in the case of EDWARD III. Summoned to do homage to PHILIP of VALOIS, as Duke of Guienne, that Monarch received him at Amiens, at the head of all the nobility of France, preceded by the Kings of Bohemia, Majorca, and Navarre. As soon as he approached the throne, the Great Chamberlain commanded him to take off his *Crown*, his *Sword*, and his *Spurs*, and to fall upon his *knees*, on a cushion prepared for him; a ceremony, says Velly, very humiliating for a soul so proud. He obeyed, however, though it was easy to trace on his countenance, the marks of the disgust he felt, at being forced to humble himself so low before such illustrious witnesses. (d) The ceremony, had continued the same for above four hundred years; and we must not forget while on the subject, the famous account of ROLLO, the proud conqueror of Normandy. When Charles the Simple granted him that extensive Dutchy to hold in fief, he was called upon, according to the practice of the times, to do homage for it. They had infinite pains to persuade him to hold his hands within those of the King; but when mention was made of falling upon his knees, and kissing his foot, (for such was the practice at that time,) he swore that he would never bend his knee before any one. It was

Capiet et provolutus in genua, supplicibus item manibus, inter sedentis domini manus comprehensis, eum (*velut adoraturus*) in hunc modum alloqui. "Devenio homo vester ab hac die in posterum, de vita, de membro, et de terreno honore verus et fidelis vobis ero, &c. &c."

From the words of this Oath, *Homo vester*, S r Henry Spelman derives the word Homage, and not from  $\text{ομα}\omega$  juro, as some Critics have done.

Spelm. Gloss voc. Homagium.

See also Coke Litt. 60.

(d) Velly Hist. de Fr. 4. 393, 399.



agreed that one of his officers should do it for him; and whether from awkwardness or design, in lifting up the foot to kiss it, he overturned the Monarch, before whom the Law had thus bound him to humble himself. The style also in which subordinate Sovereigns were summoned to do this homage, was equally humiliating. They were commanded "to lay all other affairs aside, and be with their Lord wherever he might be within the country," and by any day he chose to appoint.. (e)

But while Sovereigns were thus fettered with respect to one part of their Dominions, they might be in a state of the most absolute freedom with respect to all the rest; they might indeed, probably, be entitled to receive the same sort of oaths from the very Lords to whom they themselves had sworn: the whole depending upon the various tenures of their various domains. It was thus that the Emperors and the Popes were for some time situated; the former doing homage to the latter for the kingdom of Sicily, and at the same time claiming superiority over him right of the Empire. In such a state of things, it is obvious that there must have been a perpetual opposition of rights and pretensions; and as the ideas of men, in those days, were not the most perspicuous, and the law, in its purity and simplicity, was seldom allowed to take its course, even in points that were well understood, we must not be surprised to find much confusion in the daily practice of the times. Accordingly, though it often might happen that rights were asserted, and hostilities commenced, by a Lord Paramount *as such*, and in his own Dominions; yet if he possessed other dominions in *vassallage*, the distinction was seldom, if ever, admitted. Indeed as the vassal had sworn to defend his Lord

(e) Rym. 2. 604.

against all enemies whatsoever, without referring to any particular case, he could not consistently become his enemy himself, even though it should be in parts where he ceased to be a vassal. At all events, even on the supposition that his own personal service could be got over, and, that his own immediate vassals might follow his standard, yet one part of his subjects might then be perpetually called upon to fight against another part; a situation of such intricacy, and which demanded so many sacrifices, that we must not wonder if the Sovereigns of that time incurred forfeitures, and were often fairly declared *Traitors*, for doing that which, in their other capacity, they were legally permitted to do. Here, therefore the niceties of the feudal law, evidently transferred themselves into the Law of Nations, and began an endless maze of trouble and confusion, which brought the wars of those times almost always to a state of civil war.

Examples of the above observations are to be found in every page of the history of the earlier ages, and personal contests and hatred among Sovereigns, the consequence of having their passions thus called forth, were the natural result of these customs. To produce them were almost endless, and to the attentive reader of history, unnecessary; those, however, which may be selected in proof of the points touched upon, may be divided into two classes; namely those which concern the intercourse between superior and vassal, on matters immediately arising between themselves; and those in which the superior interfered, in order to do that justice, and afford that defence to his vassals, against one another, which he was bound to do by the system which is the subject of our Commentary.

The latter class present to us the picture of a common Court, or high Tribunal, in which Sovereigns,

such at least as acknowledged one head, were heard, and their causes tried by other Sovereigns like themselves. An admirable institution! which, had it been administered, or could it have been preserved to this day, in all its purity, would have often spared those cruel appeals to the sword, which have so frequently swept away thousands from the face of the world.

As the two great kingdoms of France and England were more implicated in these feudal difficulties than any other, from the immense fiefs possessed by the latter on the continent; the cases which might be produced, would naturally be most sought for in the history of their transactions, even if we were not, as we are, more interested from birth, and the better means of information, to examine them. I shall, therefore, in the following examples, confine myself chiefly to the old story of the PLANTAGENETS and CAPETIANS.

In the year of 1200, John, King of England, was declared guilty of felony and parricide, by the Parliament of France, for the murder of his nephew, Prince Arthur; his process was regular and formal; he was told that whatever might be the sentence it would be executed, and, upon default, was *convicted, attainted, condemned to death, and declared to have forfeited his lands.* (f)

In this, PHILIP interfered in consequence of *appeal*; there was no quarrel between him and JOHN. The appeal, however, which brought on the war, was from others as well as from the kindred of ARTHUR.

The story of that unfortunate prince is well known; the injuries of HUGUES LE BRUN are not. John

(f) Mat. Par. sub. an. 1202. Velly. 2. 195.

being at Paris, was invited to the nuptials of that nobleman with Isabel d'Angouleme, and was so struck with her beauty, that he carried her off in the way to the church, and married her himself. Hugues flew to arms, together with his kindred, who were illustrious and powerful, but being foiled by the tyrant, they appealed to Philip, who summoned him before his Peers. According to the feudal law PHILIP was right; and had the natural course of things taken place, without alteration from other external circumstances, it should seem that *England* ought to have remained neuter, and seen its king punished.—But in swearing allegiance, *England* had sworn to defend him against all enemies, and in all cases whatsoever, and it had no right to enquire into the justice of PHILIP's proceeding. Here then is an eminent effect of the feudal system upon the Law of Nations, in furnishing causes for war. The hostilities in which the two nations were thus involving lasted fifty-six years. (*ff*)

In the reign of Henry III. the viscount of Bearn, a vassal of France, having a dispute with Henry, as *Duke of Guienne*, about the property of certain Castles, threatens to complain of him to the king of France as his superior lord.

The form of Summons to the Kings of England to do their homage, was constantly regulated, and Philip the Hardy, possessed such power in Guienne, that he even built cities there, and of his own authority abolished, at the request of the English themselves, certain customs which he conceived to be unreasonable. (*g*)

In the year 1292 the English subjects of EDWARD I. quarrelling with the French in Gascony, war was

(*ff*) The story of Hugues le Brun, is in Velly, 2. 192.

(*g*) Velly, 3. 129.



kindled between the kingdoms. *As King of England*, Edward could only be pursued in the usual mode of hostility; *as Duke of Guienne*, he was cited like a common subject to answer before his Lord; and though the greatest prince of his time in power and talents, the *Citation* was fixed on the Gates of a Town in the *Agenois*, and not appearing, his Dutchy was confiscated. (h) It is remarkable also, that in the instrument of citation, he was called King of England; where he was *paramount*, and not Duke of Guienne, where he was really *Vassal*. (i)

Similar to this, is a kind of Writ directed by Lewis Huttin in 1314, to Edward II. King of England, commanding him *upon the fealty and love which he bears him*; to arrest the Flemings his enemies wherever he could find them. (k) He makes use in particular of the word *Destroiz*, which it should seem had reference to the narrow seas of *England* where Edward was paramount; no mention is made of *Aquitaine* where he was Vassal, except in the direction of the Writ, which is addressed to Edward, simply, “King of England and Duke of Aquitaine.” It is true, there was an alliance between the Kings, by which enemies were mutually to be banished, but the word *Fealty*, and the mandatory style of the whole Writ shew, that if this was not really the Law and custom upon the subject, the ideas upon it were at least much confounded.

In the course of the war between EDWARD I. and PHILIP, there is another circumstance, taken notice of by the French historians, which if they are right in their notions of the customs of that time, is of considerable importance in the history of the

(h) Velly. 4. 33. 42.

(i) Rymer, 2 617.

(k) Rymer, 3. 488.

*Feudal Law of Nations.*—Edward suffered Philip to obtain an easy conquest over Guienne, the homage for which was the cause of contention, in order as it is said, “ that if he got possession of it again by  
“ force of arms, he might then enter upon it in full  
“ sovereignty by right of Conquest. (l) ” Accordingly, he afterwards sent an Embassy to Philip, telling him that he henceforth renounced him as his sovereign, and held himself free from all homage. If this was received law, it points out the means by which vassals, who were themselves powerful Lords Paramount in other places, might change their vassallage into full sovereignty. The English historians relate the matter differently, and upon the peace, Philip still remained Paramount of Guienne. These circumstances however do not affect the reasoning, provided the observation of the French writers is to be taken for law.

About forty years afterwards, EDWARD III. lays claim to certain estates in Guienne. Had there been no feudal Court, he must have asserted his cause by force of arms; it was agreed upon however, that it should be regularly brought before the parliament of France, which for that purpose was to consist of six peers at least. (m)

But nothing exemplifies the effect of the feudal Law more, than the case of EDWARD the BLACK PRINCE. The fortune of France and Spain had often sunk before him; he was at the head of half the former kingdom in Fief, which was thus divided into two nations; and he was supported by the whole force of England; yet upon complaints made by some weaker vassals, he was summoned in the plentitude of his power, from *Bordeaux* to *Paris*,

(l) Guillaume de Nangis. & see Velly's Comments. 4. 43.

(m) Peers of Edward, as a Vassal of France, Velly. Hist. de France, 4. 457.

to answer for the conduct which “out of weakness of counsel and want of knowledge” he had chosen to pursue. (n)

In the same spirit of the law, was the celebrated CHARLES the BOLD treated above a hundred years afterwards, by Lewis the Eleventh. That monarch held an assembly of Notables at *Tours*, to hear complaints against him; and he was judged guilty of leze majesty, attainted, and his process sent to the Parliament of Paris, who by a common Usher of the court, summoned him from *Ghent*, the seat of an Empire equal to France itself. (o) Many of the provinces which gave Lewis this right to interfere, were held till very lately by the House of Austria in common with the rest of Flanders—we may imagine the surprise and indignation which such a proceeding in modern times would have occasioned.

The history of Flanders during the ages before us, contains many cases of the same nature with those related above, (p) and wherever the feudal superiority of France extended itself, those rights were perpetually exerted. In 1355, Charles the Bad, King of Navarre, *but also Count of Evreux*, was arrested at Rouen, thrown into prison, interrogated like a common criminal, and threatened with death. (q) If war had not existed at that time between France and Navarre, we may suppose that it would have been the immediate consequence, and thus from the perpetual confusion of authority between dependent, and independent states, the one might legitimately be confiscated, in consequence of the quarrel of the other; the power of the last,

(n) Froissart, v. 1. ch. 247.

(o) Commynes, L. 5. ch. 1.

(p) Du Mont. Corp. diplom. univ. 1. passim. Leibnitz. Codex. Dip. 95.

(q) Froissart. ann. 1315.



was often forced into action, in consequence of the *legal* delinquency of the first.

The spirit of these customs as has been observed, was not however, confined to France: In the contest with Scotland, when John Baliol consented to do homage to EDWARD I. that monarch made him feel his dependence in a manner that would startle the weakest crowned heads of modern times; and Rymer has preserved no less than six summonses to him to appear at Westminster, in order to plead like any other subject in the common courts of the Realm. (r) In this, without entering into any unnecessary question, (which has produced so much animosity between the Scotch and English writers) whether this superiority was usurped or not, it is sufficient to observe, that, (his title being allowed,) he did no more than what the then Law of Nations, operated upon by the feudal System, permitted him to do; and Baliol, upon this principle, however indignant, did not refuse to comply.

The Emperors were for ever engaged in contests of the same kind, involving the same train of difficulties. Henry of Luxemburg understood and pursued them; his interference in the affairs of almost every Town in Italy, was founded upon them; and the Crown of Naples was once confiscated in full Diet, in consequence of feudal defaults. (s)

At another time, the Pope who pretended to the right of homage from his crown, knew how to defend his royal vassal, and excommunicated and thereby effectually repulsed the attempts of the Emperor ORTHO upon it, during the beginning of the reign of the famous Frederick II. (t) The German Constitution indeed at this day, is pregnant with the genius of this Law of Nations; and had the feudal

(r) Rym. II. 603, 605, 606, 608, 615, 616.

(s) Heifs. Hist. de l'Empire, I. 149, 50, 51.

(t) Heifs. 2. 18. Burigny Hist. de Sicile, 2. 22.



polity continued in all its vigour, the States of Europe would probably wear an appearance, not very unlike in its effects, that which the Germanic Alliances at this moment present to us.

At the same time that the operation of the feudal system upon the customs of the Sovereigns of Europe, was to introduce a kind of high Court in which many causes of material importance were determined; the Vassals who thus bowed to the authority of their Superior and their Peers, possessed privileges in their turn, which often influenced the turn of public affairs. They were Judges, as well as Suitors, in the Lord's Court, and for the most part claimed the right of opposing, if they pleased, any alienation of his fiefs which the Lord was inclined to make. Thus, they became very important parts of the executive Government of the State, and hence it is, that in almost all the old Treaties of peace, the ratification of the greater Barons of the Country, was generally necessary, and appears in all due form together with the signature of the king himself—The same privilege no doubt might be, and is enjoyed in some countries, without any reference to the feudal system. But this is rather the consequence of particular constitutions, than of the Law of Nations; and in those cases, the particular constitutions must be specified in order to come at the knowledge of the custom. In the cases before us, to say that the feudal system prevailed all over Europe, is to say at once that these privileges were parts of the European Law of Nations.

There was another part of the feudal Customs, which had so immediate an effect upon the rights of states, (and it remains indeed, in many parts, to this day,) that it would be hardly possible in this place to pass it by. This was that famous right of the supreme Sovereign to all those fiefs, whatever might be their extent or power, which were left without a head, when the reigning family failed for want of posterity.

posterity. In this case the fief reverting to the Lord, he was entitled either to reunite it to his crown, or he granted it out again to other vassals, by the ceremony of Investiture.

No length of possession could bar this right of the Lord, or transfer, consistently with law, the power to grant the fief by will, (though such power in other cases prevailed) or to elect a new Sovereign, by the subordinate vassals. But, as may be supposed, the clash of interests among contending States, was perpetual, and the intricacies of Law without end, when these claims were brought forward. The same difficulties have often attended the Chanceries and Parliaments of particular kingdoms, according to their municipal constitutions; but these, arising entirely from the feudal law, which was the same or nearly the same, all over the Western nations; these suits, were brought forward, if I may so say, in the Chancery of Europe itself.

The two Kingdoms of France and Germany, being the two great powers into which the integral empire of CHARLEMAGNE branched, and from which it put forth many fresh shoots; the influence in question was most felt among the kingdoms and states dependent upon them. I shall select a very few examples of it, in proof of the above observations.

CHARLES Count of Anjou, the famous Conqueror of Naples, in 1246, married BEATRICE, youngest daughter of the last Earl of Provence, who willed that she should succeed to the sovereignty, before Margaret her elder sister, the Queen of Saint Lewis. While that monarch lived, Margaret was forced to acquiesce in this disposition. Upon his death however, she prepared to assert what she conceived to be her rights; and in this state of things the Emperor RODOLPH, of HAPSBURG, took upon himself to judge of the dispute. He did this as *Lord Paramount*, the earldom of Provence being a fief of the old

old kingdom of *Arles*, which had been itself a fief of the Empire, and at that time reunited to it, and in consequence of this right, he gave the investiture to CHARLES. Whoever considers the remoteness of the first Emperors who were sovereigns of *Provence*, and the chain by which this right of Rodolph proceeded, will have a very complete idea of the point in question. *Provence* was the acquisition of *Charlemagne* in the eight century;—his grandson CHARLES the BOLD being Emperor, granted out the Kingdom of ARLES to BOSON, from whose family the Earldom passed by marriage to the Counts of *Barcelona*. Upon the failure of their line in the thirteenth century, the then Emperor, having all the rights that issued from CHARLES the Bold, exercised this act of sovereignty. (u)

Two centuries afterwards, and in another country, upon the failure of the male line of the last House of Burgundy in the person of Charles the Bold; Lewis king of France immediately seized upon Artois, and Burgundy, as fiefs of the Crown—the wars of France and Austria which have so long desolated all Europe, and which at this moment shake it to its centre, arose in part from this source.

A more important, because a more intricate example, is afforded by *Milan*—the quarrel about which was endless between CHARLES V. and FRANCIS I. The rights of Francis were derived to him from Lewis XII. who while duke of Orleans, had married Valentine, the last of the *Visconti* family, the male line failing. The right was questioned merely because the contract of succession, in virtue of the marriage, had not been confirmed by the Emperor, to whom the Dutchy regularly escheated. Lewis however, had afterwards held it by an actual investiture, which again was to convey the right to

(u) See Henault, Hist. Chron. de Fr. I. 238.



his posterity, only in the case of the marriage of his daughter Claude with Charles V. then duke of Austria; which, not having taken place, the right still returned to the Emperor—and hence arose another cause of the perpetual contention between the two rivals. (w)

I am sensible that in these cases, and many others that might be adduced, I may almost appear to be relating, what rather belongs to the *JUS PUBLICUM*, as founded upon particular conventions, than the general Law of Nations; but accurately speaking, these contests did not arise in consequence of any *particular Treaty*, or *Renunciation* between two States, but from the mere effect of the feudal Law, known all over Europe, and therefore according to us, the Law of Nations itself. In many other points that have been touched upon, this reasoning must be also understood to apply. The Law of Nations, is the law for a particular class of states; writers upon the subject say (and very properly) *Sovereign States*. But the sovereignty of these states, according to themselves, admits of much modification; some being Tributary, and some bound by unequal alliances. In general, however, when they have been entrusted with the free administration of public affairs, and have had the power of making treaties, or the rights of war, or of embassy, they have uniformly, by the writers on the science, been considered as forming part of the sovereigns of the world.—But the feudal vassals, however bound to obey their Lords Paramount, in many points, were precisely in this situation; and they are therefore actually classed among *States* in the various codes of the Law of Nations. (x)

(w) Guicciard, 1492. 1521. Heifs. 1. 215. Note 6.

(x) Grot. de J. B. et P. 1, 2, 3, Mackenzie Peced. of Nat. 12. Wicquefort de l'Ambass. 25, 39. Vattel. 1. 41.

Indeed



Indeed whoever recollects that John, and Henry III. were Feudatories of the Pope, and performed services as such, (y) must either deny that those Kings of England were Sovereigns; or admit that all the Barons of Europe were Sovereigns also. Whatever concerns them before, must necessarily be related, and the whole spirit of the feudal law, as it governed the intercourse of superior and vassal, or of vassals among one another, becomes also the spirit of the law of nations. In this opinion (though he has rather hinted his sentiments, and by way of comparison, than laid down the point at large,) I am borne out by, perhaps, the greatest of our antiquaries.

“ The King,” says Sir Henry Spelman, divided  
 “ his territories in different ways ;—Provinces to  
 “ Dukes, Counties to Earls, Castles and Signories  
 “ unto Barons ; rendering unto him. *not ex pacto,*  
 “ *vel condicto,* (for that was but *cautela superabun-*  
 “ *dans*) but of common right, *and by the law of na-*  
 “ *tions ; for so I may term the feudal law then to be, in*  
 “ *our Western orb,*) all feudal duties and services  
 “ due, &c. &c. *though no word were spoken of them.*”  
 (z)

Possibly this reasoning may be deemed unsatisfactory by some ; to others it may seem unnecessary ; but as this work may fall into the hands of persons not led by professional habits to consider this part of the subject ; by them it will not be thought an intrusion ; and I have adjudged it the more necessary to discuss the point, even at the hazard of being thought prolix, because I would not appear from attachment to a favourite idea or system, to introduce into a treatise of law, any thing not warranted by argument and fact.

(y) Hume, 2. 15.

(z) Spelman of Parliaments, ab init.

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THE  
FOUNDATION AND HISTORY  
OF THE  
LAW OF NATIONS IN EUROPE.

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AN  
ENQUIRY  
INTO THE  
FOUNDATION AND HISTORY  
OF THE  
LAW OF NATIONS IN EUROPE,  
FROM THE  
TIME OF THE GREEKS AND ROMANS,  
TO  
THE AGE OF GROTIUS.

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By ROBERT WARD,  
OF THE INNER TEMPLE, ESQ, BARRISTER AT LAW.

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Semina nobis Scientiæ dedit Natura, Scientiam non dedit. — SENECA.

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CHAP. XIII.

OF THE INFLUENCE OF CHRISTIANITY, AND THE  
ECCLESIASTICAL ESTABLISHMENTS.

THE Law of Nations being founded in a great measure upon the systems of morality, good or bad, pursued by certain sets or classes of people; and *Religion* being every where the ground-work of the morality observed, the Christian religion, as we have mentioned in a former chapter, (a) may be supposed not merely to influence, but to be the chief guide of the christian law of nations.

It certainly has had so powerful an effect upon it, that wherever it has existed, it has gone the farthest of all causes to introduce notions of humanity and true justice into the maxims of the world. The great proof of which is, that if we compare the conduct of CHRISTIAN nations, with that of nations

(a) See Chap. V.

professing any other religion, (whatever may be their stages of improvement, or in whatever æra of their glory,) the result I believe will be uniform and universal, that the one will be eminent over the other for regularity, equity, and benevolence. In making the comparison, it would be unfair to bring into the account, any of those nations that are still approaching to a state of nature. I pass by therefore all people who may yet be denominated savage, and refer for the sake of greater accuracy, to the most eminent alone of the nations of antiquity, and of the moderns who live under a persuasion different from ours.

The Greeks under the æras of PERICLES, SOCRATES, EPAMINONDAS, and AGESILAUS; and the Romans, under the reign of AUGUSTUS, (which for polish and refinement has become proverbial,) had advanced, I believe it will be owned, to their summit in every sort of knowledge; the names of SOCRATES and CICERO would alone be sufficient to prove it. Yet we need only refer to the slight sketch already given of their maxims with respect to their intercourse with foreigners, (b) to be convinced of their backwardness in the knowledge of the law of nations considered as a science.

If commerce and the acquisition of riches, by visiting every nation in the known world, could conduce to perfection in this law, the *Carthaginians* promised fair to be, in this respect, the most perfect people of antiquity. The savageness, rapacity, and injustice however, of every kind, which marked their conduct towards all foreign nations, are too well known to detain us longer upon them.

If we look to the *Mahometan* and *Turkish* nations, (though their power has been equal to the greatest, and their Empire of considerable duration,) their

ignorance and barbarity repress all examination, and if they have received any improvement since the days when they first set foot in Europe, it is probably from their connection with people professing the very religion which they most hate and despise.

The same inferiority in this sort of conduct, is to be found even among the CHINESE, so famed for eminence in every other branch of knowledge, and in the science of morals itself. Their wars have always been carried on with *Eastern* barbarity, and their known laws against strangers would alone demonstrate the point.

Among the CHRISTIANS on the other hand, every thing is conducted, or at least enjoined, by received and general laws, upon principles of the most extensive humanity and the most regular justice.

I am aware that this was by no means the case during the centuries before us, of which the picture of manners brought forward in a former chapter, (c) is a sufficient proof; and as CHRISTIANITY had then been long known in the world, it may fairly be asked, of us, if the precepts which it holds forth, are the chief causes of that benevolent and equal morality on which the modern nations pride themselves, how it came to pass that during all the ages that have been mentioned, its effects were not more visible upon the customs of mankind?

The answer is to be drawn partly from circumstances in the history of Europe, partly from the remoteness which is often to be observed between cause and effect. More than three hundred years passed on, before it was possible for CHRISTIANITY to interpose with effect in the laws of the world; those who had the power of making laws, having been so far from adopting its precepts, that it became the object of their most violent persecutions. For

(c) See Chap IX.



four hundred years afterwards, Europe was torn to pieces by the rage of different races of barbarians, who pressed upon one another too fast to allow any time for the milder doctrines of peace to take effect, and who most of them professed a religion whose precepts were the very reverse of those of CHRISTIANITY. The undulations of that storm remained long after, and the corruptions, the degeneracy, and dissensions of the Church, prevented it from fulfilling its duty even when order had been restored:

The Volume of duty however laid before us by CHRIST, continued always the same; and whoever consulted it even in the dark interpretations which ambition or avarice, superstition or ignorance, but too often put upon it, found benefit from it in the end. Its progress, though perpetually interrupted, was finally certain, and mankind at length enjoy, what was intended for them long ago.

Let no one here say with too great confidence, that the order now established in the Law, is owing to extraneous causes; to the natural tendency of men towards improvement; the establishment of government; the extension of commerce; or the progress of the sciences. These can no doubt do much; but could they of themselves alone have *reformed* the Law of Nations, the *Sets* of People we have just mentioned, would have presented us with a Code of maxims, and a practical conduct, far different from that which we have been able to discover, even at the very highest points of their refinement. Besides, nations, with one or two exceptions, have for the most part dated their progress in morality from the epoch of their conversion; and in the history of the corruptions of the church itself, it is conspicuous, that morality has been at its lowest ebb, when the church was most abandoned to worldly affairs, or most corrupted by Bigotry and Superstition. The progress of mankind however went on in all other points,

points, notwithstanding their depraved notion of christianity, had it also gone on in the science of morals, the argument would be fairly destroyed.

An example of the truth of these observations is but too near us both in time and place; for it has been obvious, that the people of France were led, first to tolerate, and then to rejoice in the shocking crimes of their Convention, in almost exact proportion as the latter was able to extinguish among them their ideas of religion. They afford us the proof also of the connection between morality and the Law of Nations, since the extinction of the one, was the signal for those pretensions and usurpations, which justly drove away their Ambassador from a respectable Republic, (d) and called the greater part of Europe to arms.

Possibly it may be argued that, as according to our own account, effects are long in their production; if the systems of morality which have been given by the ancient Philosophers of Greece and Rome; by CONFUCIUS, or MAHOMET, or BRAMA, contain principles which have an equal tendency with Christianity to render their followers more humane and benevolent, the Law of Nations is not so superiourly obliged to that religion.

Admitting the fact for a moment, it will not affect the argument in question, which is confined to the simple circumstance that Christianity has *already* produced a certain effect; and the most it can therefore amount to is, that the other systems, *when practice shall have accorded with them*, will at some future period do that, which they have not yet done.

The fact however does not warrant the supposition. It must be owned that we must always allow every force to the spirit and genius of CODES OF LAW; and if refinement, or notions of justice appear

(d) America.

in *them*, it will be fair to attribute a considerable portion of them to the people that could produce them, though their practice may be different from the theory. But the practice of the antient nations was so far from a violation, that it was an absolute fulfilling of the law; nor were any of the instances of injustice that have been mentioned, not supported by the writings of Solon, and Aristotle; of Ulpian and Pomponius. (e) These Codes, however, were composed under whatever influence the precepts of the religions of the countries, such as they were, could be supposed to have; and it would have been better for the world if the concurrence of so many religions, in the praise of whose toleration Mr. Gibbon has been so copious, could have produced a better effect upon the codes of the Law of Nations then in existence. However opposite might at first have been the conduct of men, they would at last have been improved, though by degrees almost insensible.

Upon the whole then, even upon the supposition that we are not able to trace the effect of CHRISTIANITY upon the Law of Nations *step by step*, and that men were over-run with barbarism long after their conversion; it is by no means consequential that it has not in the end been the great cause of the improvements witnessed by later times; and although in examining its effects chronologically, we are bound to take notice of them under whatever form they present themselves; whether in the immediate improvement caused by an attention to its principles in their purity; or in the strange customs and maxims which arose out of their corruption; still the point holds firm, that if a particular set of morals begets a particular Law of Nations, and those morals emanate almost always from religion, the difference between the Law of Nations professed by the CHRIS-

(e) See Chap. VI.

TIAN Republic, and that professed by other classes of people, must ultimately have been owing to the CHRISTIAN Religion.

These observations being premised, we shall proceed to take notice of every effect upon the law before us, which we think can in any wise be attributed to the influence of CHRISTIANITY, or its Establishments; whether they were well or ill directed; whether they enlarged or corrupted the mind; whether they were the instruments of good or evil.

One of the first and best of its effects, was to soften those rugged features which the manners of Europe had assumed from the time of the irruptions of the Barbarians.

Behold, says ADAM of BREMEN (speaking of Denmark) this piratical people, who formerly depopulated the entire provinces of Gaul and Germany, now content within their own boundaries, and saying with the Apostle, We will set our affections on things above! Behold this country, formerly impossible to be visited on account of its idolatrous worship, now laying aside its natural fury; listening to the voice of the preachers of truth; and after destroying the altars of dæmons, erecting those of Christ. (f)

Pour ce que pour la garde et conservation, says an old Treaty, de toutes Polices, Gouvernements, et Bien publicq. n'est rien plus utile, ni plus necessaire, que PAIX, AMITIE, et bon union par ensemble, qui sont mer de tous biens et vertus, *a cause que le service divin est augmenté*, &c. (g)

We have seen in a former chapter, (h) the jealousy with which strangers were viewed by many of the

(f) Ecce populus ille piraticus, &c.—Adam. Brem. de Sir. Dan. p. 41.

(g) Tr. d'alliance entre Brabant, Middlebourg. &c.—Recueil des Traiter, i. 735.

(h) Chap. VIII. ad fin.



laws of the northern people; and the cruel rights pretended to against them, have already been the subject of our animadversion. By strangers, I do not here mean those persons merely who were of the same state, and chanced to be absent from home; but foreigners, whose language and manners, and probably the interests of whose country, rendered them suspected, and who on that account, as we have seen, were often treated as if they were declared enemies. In this state of things, the mild spirit of CHRISTIANITY operated with considerable effect, in recommending and enforcing a better order of proceeding. Exclusive of the influence which it must be supposed to have had upon the breasts of individuals, its dictates are often expressly mentioned as the foundation of many of the laws that were enacted to enforce the duties of hospitality. By a law of the Bavarians, preserved in *Lindenbrogue*, the care and safety of strangers is enjoined on the penalty of fourteen shillings. “*Deus nam dixit,*” says the law, “*peregrinum et pauperem, non contristabis de rebus suis.*” (i) By a law of the Hungarians, the lateness of whose conversion (begun in the tenth, and not completed till the thirteenth century) gives us opportunity to mark more immediately the effect of the new religion, benevolence towards strangers is enjoined for the sake, and after the example of CHRIST.

“*Nam Dominus Virtutum, ipse est Rex Regum. Jubeo, ut per omnia et in omnibus, pietate fultus, non solum parentelæ et cognationi, vel principibus, five ducibus, five divitibus, seu vicinis, et incolis, sis propitius; verum extraneis, et cunctis ad te venientibus. Semper illud Domini, in tuis habens, exemplum, misericordiam volo et in sacrificium.*” (k)

(i) *Lindenbr.* 412.

(k) *Respub. et Stat. Hungar.* 164

So also by the ecclesiastical laws of the Saxons, the Presbyters of every parish are commanded to use their endeavours to inculcate the duties of hospitality among their parishioners, to feed the hungry, clothe the naked, visit the prisons and the sick, and love and cherish strangers as their brethren, in compliance with the precepts of the Founder of their Religion. (*l*)

But one of the most immediate effects which Christianity had upon the face of things, was in opposing, and with no inconsiderable degree of power, the forcible current of private war. The universality and duration of this custom has been amply discussed, and we have seen the accession, force and regularity which it received from the feudal constitutions. Kings in vain endeavoured to repress the evil by force. While every family was in arms, the power of the Monarch was small, and the quiet voice of the civil tribunals could not be heard. It was then that the Church, fulfilling its duty, interposed with effect, and the rugged licence of the times was made visibly to bend before the influence of the ministers of religion.

All the codes of law had in general ascribed to CHRISTIANITY the foundation of the most solemn duties they enjoined. The wanton effusion of Christian blood is forbidden by CHARLEMAGNE, expressly upon the various texts of scripture that prohibit murder; (*m*) and many of the *Saxon* laws contain an enumeration of the virtues of a good Christian; among which, to live at peace with men, they command as the most eminent.

(*l*) *Instruat ac doceat ut hospitales sint; ut nullis itinerantibus hominibus domam suam denegent.* Leg. Eccles. ap. Wilk. 185.

*Esuriētibz cibum dare debemus, sitientibz potum, nudi operiendi sint, et infirmos, ac qui in carcere sint visitare debemus; et advenas excipere debemus uti dominus noster, ipse dicebat, &c.* Id. 189.

(*m*) Capitul. Carolom. Lib. 5. Cap. 180.

Such

Such indeed had been the ferocity of those days, that men pursued their violences even within the very walls of places consecrated to prayer and humiliation; one of the first endeavours therefore of the Church, was to abolish this barbarous custom; and hence throughout the codes of law among all the German nations, the *PAX ECCLESIAE* makes so conspicuous a figure. Among the *Saxons* in the south of England, to fight within the body of a church, was punished with the loss of all that the offender possessed; and to fight to the death, was supposed to be absolutely inexpiable. (*n*) “How,” say the words of the law, “can any man think in his mind, that he can approach the altar, and ask a blessing of the minister of God, if immediately afterwards he is to become impious in word or deed? We have all one heavenly father, and one spiritual mother, which is the Church, and therefore we are all of us brethren. The peace of the Church is the great peace to be cultivated by a christian, and a christian ought therefore to pay it the utmost deference.” (*o*).

Such was the language of the Saxon *Æthered*, in the opening of the eleventh century: it was imitated by all other codes and punishments for breaches of the *PAX ECCLESIAE*, sometimes corporal, but generally pecuniary, were held out by the Swedes, Danes, French, and Germans. (*p*) By the laws of the Frisians, a man who was involved even in a legal (*q*) feud, was to enjoy security in his own house, in the Church, and in going to it and return-

(*n*) Willk. Leg. Sax. 2.

(*o*) Leg. *Æthered*. ap. eund. 122.

(*p*) Vide Loccenius, Leg. Civ. Succ. 301. Jus Danic. Lib. 2. 63. The Capitularies are full of them, and the *Consuetudines Feudales*.

(*q*) See Chap. XI.

ing from it, under a heavy penalty. (r) By the laws of the Alemanni, whoever killed another within the gates of a church, was obliged to acknowledge that he had offended against God, and polluted his temple; and to pay sixty Shillings to the service of religion, and sixty to the public treasury. (s) By the English laws also, the walls of a monastery were held as sacred as those of a church. (t)

In the coronation ceremony of the Emperor OTHO, (an. 936) we have a strong proof of the sense of the duties expected by christianity from Sovereigns. When the archbishop of Mayence girt him with the sword, he said to him in solemn terms, "Receive this sword, and make use of it to suppress all bad Christians, and the enemies of JESUS CHRIST; use the power and authority of the empire, which God has given you, to assure the peace of the Church." (v)

This was the first step. They proceeded by degrees to inculcate equal reverence for particular days, rendered sacred from the solemn and important events which had happened upon them; as the death of Martyrs, the call of the Saints, and the chief actions in the life of our Saviour. It is indeed remarkable to reflect with what care, and under what heavy penalties, the exact observance of the Lord's Day was enjoined by such men; not merely with respect to quarrels, but to labour. The laws of the Bavarians, proceeded *expressly* upon the fourth commandment, punish any one who puts

(r) Homo *fidelis* pacem habeat in Ecclesia, in domo sua, ad Ecclesiam eundo, de Ecclesia redeundo, &c. Qui hanc pacem effregerit et hominem occiderit, Novies 30. solid. comp. &c.—Heroldus, L. L. Fris. 143.

(s) L. L. Aleman. ap. Lindenbrog. 364. Compare this with the customs of the worshippers of Odin.

(t) L. L. Æthered. an. 1014.

(v) Heist. 1. 56.



oxen to a cart on the Lord's Day, with the loss of the right-hand ox. Whoever works even at harvest, on the same day, shall for the second offence receive fifty stripes; for the third offence, he shall lose the third of what he gains; and for the fourth, shall be deprived of liberty. (w) In the same spirit were the laws of the Alemanni, and a capitulary of CHARLEMAGNE, which enjoined that such sabbath-breakers should be carried before the Count, and being convicted, should remain for ever a slave, *quia noluit Deo vacare*. (x.)

Practice, however, both with respect to labour and to feuds, being too generally at variance with duty, notwithstanding all these expedients, others were fallen upon of a more serious nature; and however marvellous they might sometimes have been; however low the influence of the Church must have fallen to be obliged to have recourse to these pious frauds, still their effect, which was for some time successful, and which could only have arisen from deference for religion, demonstrates its power in a forcible degree.

Towards the close of the tenth century, efforts had been made to put a stop to the rage of private war, by depriving the disturbers of peace, of christian privileges, (such as the rights of burial,) and exhorting them to abstain from hostilities, on the sacred bodies of the Saints, which were carried to a great council of ecclesiastics held at *Limoges* for that purpose. These endeavours failing, an expedient was afterwards fallen upon, which for some time had the desired effect, and gave rise to that celebrated regulation called the *TREUGA DOMINI*. This truce from war was thus emphatically termed the truce of

(w) L. L. Boioarior. De op. dom. die illicit. Heroldus 99.

(x) L. L. Aleman 38. ap. Lindenbrog. 373. Capit. Carolm. L. i. S. 81.

the Lord, from the supposition then spread abroad, that an Angel had brought a writing from Heaven to a bishop of *Aquitaine*, commanding men to lay aside their animosities on pain of incurring the wrath of the Almighty. Strange as it may be thought, this supposed miracle had an immediate influence upon mens minds, a general peace took place for seven years; and afterwards it was agreed upon, that *Christians* should never attack one another from the Thursday evening of one week, to the Monday of the next, on account of the circumstance that the passion and the resurrection of our Lord had happened on the intervening days. (y) This regulation became at once general in Europe, was confirmed by the Pope; (who denounced excommunication upon those who violated the agreement;) by various associations for the better support of it; and by the laws, ordinances, and conventions of almost all the different States.

Many of the deeds are extant. In 1027, we find an association between the bishop of *Helena*, in Rouffilon, his canons and clergy, and the body of his vassals, women as well as men, by which  
 “ omnigenæ hostilitates, aggressiones, incendia, et  
 “ latrocinia prohibentur, ab hora sabbati nona,  
 “ usque in diem lunæ hora prima,” &c. (z). In 1045, there is another league between the Archbishop of Narbonne, the Count of Rouffilon, and other Nobility of the South, for the better observation of the TRUCE OF GOD; (a) and in 1054, another more general, for the same purpose, made by Bishops, Nobles, and ordinary persons. It runs thus:

(y) Henault Hist. Chron. de Fr. i. 154.

It is to be wished that Dr. Robertson had pursued his researches upon the origin of the Treuga Domini (Note x. Intro. CH. V.) farther than he has done

(z) Du Mont. Corps. Dip. Un. i. 43.

“ TREUCA,

“ TREUGA, seu PAX PUBLICA, et RELIGIONIS, per decem Episcopos, duos Comites, una cum Abbatorum, et Clericorum, et quorundam Nobilium, et ignobilium non minima multitudo sancta, “ pro renovatione, extentione, et strictiori observatione TREUGÆ DOMINI; qua, præter alia, “ omnes hostilitates, ab occasu solis quartæ feriæ, “ usque secundæ feriæ illuscente sole prohibitæ fuerant.” (b)

By this deed, among the other just resolutions, the payment of debts is determined upon; and such is their love of peace, for the sake of the Author of their religion, that whoever sheds the blood of a christian, is guilty, it is affirmed, of shedding the blood of CHRIST himself. It is not improbable that the wish to avoid the shedding of christian blood, so often expressed by different Potentates all through the centuries from that time, is derived from this remarkable and characteristic phrase.

The passions of mankind, however, heightened by the little power of coercion possessed by the Civil Magistrate, could not long be reined in; and as that false spirit of religion which evaporates in superstition, is capable of little more than sudden impulses; the rage for war, and the thirst for private vengeance, broke out as strong as ever in a very few years.

The Church was again obliged to interpose, by the suspension of christian rights; but their interposition was vain among men who laid no stress on their most solemn engagements; and in France disorder rose to such a height, from the mutual invasions of French, Arragonians, Germans, and Brabancons, that in the South no one could stir out of the fortified places. (c) In this miserable

(a) Id. i. 451.

(b) Petr. de Marca, Concordia, &c. ap Du Mont. i. 47.

(c) Velly 2. 135.

situation, tranquillity was for a time restored by a mechanic of *Puy* in Auvergne. This man, a carpenter by trade, being accustomed to pass the eve of the Annunciation in prayer, persuaded first himself, and afterwards the people, that the VIRGIN MARY had appeared to him, and commanded a general peace throughout the world; as a proof of which, she had shewn him an image of herself and Son. The simplicity and religious fear of the multitude soon caught the inspiration; a general peace was resolved upon; a society was instituted on the spot; and Bishops, and men of all ranks, flocked from every part to partake of that tranquillity which they verily believed had been visibly commanded by Heaven. Many were the effects of this association, which assumed the name of the BROTHERHOOD OF GOD, and wore a leaden Agnus Dei upon the breast. They forswore drinking, gaming, and luxury, and bound themselves never to take false or dishonourable oaths; they did more; they swore to make war upon the enemies of peace, and for this purpose assembled an army, which defeated in two battles the ravagers whose disorders had occasioned the Institution. They were in the end, however, not merely defeated, but absolutely annihilated themselves.

L'Abbe Velly, on the authority of an antient manuscript, found at the end of a French Chronicle, which finishes with Charles the Wise, (in the fourteenth century,) gives an account somewhat different from De Lauriere, (*a*) and attributes the origin of this transaction, not to fanaticism, but to avarice. It had been the custom, says the manuscript for all the Princes and Lords in the neighbourhood of *Puy*, attended by a number of tradesmen, with their goods, to assemble in that city on the feast of

(*a*) Pref. Ordonn. des Rois de France.



the Annunciation, which brought great profit to the Church. The disorders of the times, however prevented men from travelling; and a Canon of *Puy*, unwilling to lose his usual advantages, instructed a young man, a stranger in the town, to appear disguised like the Virgin to the pious mechanic, which produced all this effect. Whether this story be true or not, and it must be owned that superstition, rather than true religion, was the cause,) the event proves the influence of Christianity on the customs of the time.

We have seen in a former chapter (e) the universal existence of slavery during the earlier ages, and it was shewn to be chiefly owing to the efforts of Christianity that the Institution was abolished. In the attempt to effectuate the abolition, and the success which in the end attended it, we have a full proof of the *general* influence of this religion upon the mind, since no passage of the New Testament has absolutely *forbidden* the custom; and it is merely therefore from the spirit of the system of morality there displayed, that men collected what ought to be their conduct in this respect. Commanded to look upon all mankind as their brethren, it wanted little combination of the reasoning faculties to discover that it was incompatible with such an injunction to hold them in chains, exclusive of the benevolent effects upon the heart, which the religion was calculated *generally* to produce, and which, when produced, did that from analogy which was not expressly commanded. After this, and what was said in the beginning of this section, it is of little consequence to object that the custom of slavery remained for a great length of time, or that the Church itself was possessed of numbers of slaves. We have shewn that the custom of enfranchisement was the

effect chiefly of pious and christian motives, and that the example was generally set by the ministers of religion. No law, it must be owned, is to be met with, by which the custom was abolished all at once, nor could such a law have ever been justified: I do not mean on account of the claims of the rights of property, (which, if they are incompatible with divine institutions, should never be so much considered as to retard their effect,) but on the principles of the very benevolence which it was meant to consult; for the men who would have been the object of it, being thus thrown suddenly on the world, without protection, or the means of support, would have been put in a worse condition than they were in before. It must be owned also, that avarice, and the love of absolute dominion, might have thrown considerable obstacles in the way of the abolition.

Upon the whole, however, it was not unwise to trust it to the voluntary acts of men guided by the spirit of their religion, which, as we have seen, did much in the ages before the period we are now describing, and which continued its efforts long afterwards. At the same time it is to be mentioned, that many of the Saxon laws took it within their scope, and did somewhat towards it, when they prohibited, from *christian* motives, the sale of Christians out of the country, or among Pagans, NE ANIMA PERDITUR QUAM CHRISTUS PROPRIA SUA VITA REDEMIT. (*f.*)

The Hungarian laws, under King Stephen, went still farther: "If any one," says that pious Monarch, "influenced by pity, shall have promised liberty to his slaves or handmaids, and dies without having time for a will, his widow or son shall have pow-

(*f.*) Concil. Æthamenſe, et Lib. Conſt. ap. Wilk. 107. 1204  
134.

“er to execute his intention, *pro animæ redemptione sui mariti.*” (g)

Hence also, when *Suarez* marks the difference which he very justly holds between the law of nations and the law of nature, he adduces, among other proofs, the abolition of slavery as arising from the positive institutions of the *Christian Church*. (h)

But nothing on this subject can be more forcible than the language of the learned Sir Thomas Smith, speaking of bondage and bondmen. “Howbeit,” says he, “since our Realme hath received the Christian Religion, which maketh us all in Christ, *Brethren*, and in respect of God and Christ *Conservos*; men beganne to have conscience to hold in captivitie and such extreme bondage, him whom they must acknowledge to be their Brother, and as wee use to terme him, *Christian*; that is, who looketh in Christ, and by Christ, to have equal portion with them in the Gospel and Salvation. Upon this scruple, the holy fathers and friars, in their confessions, and specially in their extreme and deadly sicknesses, burdened the consciences of them whom they had in their hands; so that temporal men, by little and little, by reason of that terror in their conscience, were glad to manumitte all their villaines. The holy fathers and friars, however,” (adds this grave person,) “did not in like sort by theirs.” (i)

Dr. Robertson, in a very learned and copious note upon the state of slaves during the earlier ages in Europe, has forestalled much that might be adduced farther on the score of authority, with respect to en-

(g) L. L. Sancti Steph. Resp. et Stat. Hung. 177.

(h) Sic enim JUS GENTIUM de servitute captivorum in bello justo, in Ecclesia mutatum est, et inter *Christianos*, id non servatur.—De Legib. ac Deo Legis L. 2. C. 19. Vide also Grot. D. J. B. et P. 3. 7. 9.

(i) Commonwealth of Engl. 137.

franchisement on christian motives. To that note (k) I shall therefore refer the reader, and content myself with pointing out a few other instances, which powerfully confirm the opinion; such as the decree of the third Lateran Council, under Pope Alexander III. by which it is expressly declared, that all Christians ought to be exempt from slavery; (l) and a law of Sweden, about the year 1299, known by the name of king Birger's law, by which the sale of slaves is prohibited, expressly on account of the injustice of such a practice among men; *whom Christ made free at the price of his blood.* (m)

But of all the effects of Christianity in altering the political face of Europe throughout all its people, and which may therefore very fairly be denominated a part of its Law of nations; none are so prominent to observation during these centuries, as those which sprang from the influence and form of government of the Church:

The Bishop of Rome, by means which it falls within the province of Ecclesiastical History to deduce at large, rather than of a treatise like this, had risen to a height of power wholly unparalleled in the history of the world; and although at first he was, comparatively, without territory, without troops, without riches, without feudal rights; he obtained by his spiritual influence alone a despotism, first over the minds, and afterwards over the temporalities of princes, which made him soar far above them all in power and pre-eminence.

It is true, that in all well regulated communities, the effect of Religion has been so great as to reflect considerable respectability upon its ministers; but in the ages of antiquity, and in countries *not* christian,

(k) Note U. Introd. Ch. v.

(l) Henault Hist. Chron. i. 195.

(m) Loccen, Leg. Suec.



their influence has been confined within the bounds of a single state. The High Priest, or the Patriarch, has had much sway in the Hierarchy of his country, and much personal influence over the minds of his countrymen; but it was reserved for the *Christian* nations alone, uniformly to obey, though dissimilar in origin, character, and language, and often disunited by opposing interests, ONE PARTICULAR MAN taken promiscuously from among them, to expound their religious duties, and be their director in points of conscience. Nor is this, while divested of extraneous matter, so incongruous or unnatural as it has appeared since the usurpations and tyranny of the Supreme Pontiff. If there is any thing that can unite men and nations of the most discordant characters, it is the profession of the same religion; especially a religion, the very essence of whose morality is to consider all mankind as brethren. Of such a religion, thus generally professed, every minister, let what will be his country, will naturally have an influence over all communities whatsoever; he talks to them the same language, he teaches them the same truths, he is clothed with a character which all are bound to respect, and he belongs as it were, to the same state with every one, or rather all states, in this point of view are indifferent to him. The CLERGY therefore, in the natural state of things, are among Christians, absolutely a different body of men from the rest of the world. They form a community, made up from other communities; they are selected to be the channels by which the benefits of a religion common to all, are to be conveyed equally to *all*. The whole world is their care, and universal order and benevolence their objects, and though the unavoidable divisions of mankind into separate nations, superinduce the same sort of divisions among them; (which thus have particular communities allotted to them as their peculiar charge) yet the

bond of Union occasioned by one common religion continues always the same, and a Christian Ecclesiastic, whatever may be his country, is *every where* entitled to the reverence and influence attached to his character.

But if this be the case in Theory, (although the imperfections and blindness of men have rendered so noble a theory abortive in the practice,) the Supreme Head of this venerable body, would naturally be intitled to as much greater a proportion of influence and respect, as the head of any other institution possesses above its subordinate members. He is selected to superintend the discipline, the manners, and the qualifications of those, who are themselves the regulators of discipline and manners to the rest of the world. All men therefore, ought fairly to look up to him, as to their father and chief counsellor, and he would in return advise and correct them as his children, with equal severity, and equal love.

Such actually is the picture, which the Religious Establishments of *Christian* nations display to us in Europe during the earlier ages, divested of the *corruptions* which afterwards defaced it. A Hierarchy, neither unnatural, nor unwise!

It does not fall within the scope of our enquiry, to shew by an enlarged detail, how the Patriarchal Church of ROME, attained to this pre-eminence over other rival churches, such as *Carthage*, *Antioch*, or *Constantinople*; or how it rose from the equality in which originally all the Churches of Christianity had been established: Neither is it more relevant to trace minutely the progress of the Pontiff's power over the mind of man, his claim to infallibility, or his pretended succession to the power of SAINT PETER. It is sufficient that the fact of his superiority did actually exist, and that the western nations chose to consider him as the chief of CHRISTENDOM; to obey him as the successor of the Apostle, and their  
infallible

infallible director in all points of morality, of conscience, and of faith.

The aspect of Europe however came thus to be changed; all the various barbarous nations that had poured in from Scandinavia or Tartary, from the North or from the East, ceased by degrees to consider themselves of different races, and in some measure coalesced under one great bond of union. And although they were independent of one another, and every sovereignty was supreme with respect to the rest; yet for *religious* purposes, and in consequence of *religious* deference, they were willing, all of them, to part with a portion of that Sovereignty, and the whole of what was parted with being united under the Church and swayed by one man, composed a new kind of dominion, as firm and extensive, as it was remarkable.

By the Constitution of this dominion, whoever was the possessor of the Papal Chair, was in some measure the director of the affairs of Europe. He was the supposed Mediator between Heaven and the world; he decided upon right and wrong; he was the great casuist in all difficulties; and among sovereign princes, who obeyed no other tribunal, he might fairly be called the CUSTOS MORUM. Could it have proceeded without abuse, or was it the lot of mortality to admit of such perfection of wisdom and virtue in one man; the Institution would have been admirable! A common Tribunal was thus supplied where it most was wanted; Appeals lay to it from all corners of Europe; the weak could be upheld; the strong could be repressed; the most divine of all Institutions, JUSTICE, had free room to display itself; and the FATHER OF CHRISTENDOM might really have been what his name implied.

The arms which enabled him to enforce the power so granted are too well known to need any elucidation. I shall only observe, that when men could

agree, from spiritual motives, to pay such uncommon deference to an individual who possessed no kind of temporal rights over them; it was but natural for them to suppose that he possessed the absolute disposal of spiritual rewards and punishments. His dominion, being founded upon influence over the mind, and imagination, the things which have the deepest effect upon them must have been subject, or supposed to have been subject to his will; and it is not wonderful therefore that his privileges of remitting sins, of depriving men of Christian rights by excommunication; and of being the sole person to receive them again within the bosom of the Church should be so universally allowed, and attended with such remarkable effects. Nor is that right which was claimed to arm other powers against refractory princes, by any means so great an usurpation (these premises being allowed,) as at first sight it may appear. The power with which men chose to invest their Holy Father, of marking out a man for public execration and public destruction, for the sake of virtue and religion, was really but nugatory, unless he also had the power of calling upon the secular arm to support him. Hence could the Ecclesiastical Establishments which arose out of Christianity, have really ever existed in their purity, or for the sole purpose for which the *language* of the Theory intended them; had the papal thunders been only dealt out in the case of some horrid atrocity, worthy of divine wrath; the interference of different Potentates with one another at the call of the Pope, and the consequent multiplication of the *legitimate* causes for war, would not have been so unjust, or so strange, as they appear in the histories. As long as the Ecclesiastical Constitution was supported by the thrones of Europe, it was but a fair and natural consequence, and it is the abuse of the institution, not the



the institution itself, which chiefly calls for our animadversion.

When JOHN, king of England, by his violence and depravity, had drawn down upon himself the just detestation of mankind, and the frequent admonitions of the Pope, he laughed at attacks which, while he was at the head of the *whole integral* force of his kingdom, could only, or chiefly, affect his reputation. But when the holy father uttered his final malediction, which disarmed him of half his power, and gave the King of *France* authority to execute the sentence of excommunication, the Tyrant, humbled by the spiritual and temporal powers united, was forced at last to give way, and to reconcile himself to the Church at the expence of his independence. The consequence is well known. The hand which directed destruction against him when he was supposed to deserve it, was able to avert the blow when he had expiated his offence; and PHILIP AUGUSTUS, though he refused to lay down his arms, was unable to contend with the restored vigour of JOHN. (*n*)

In this example I am far from the most remote thought of vindicating the motives and conduct either of INNOCENT III. or of PHILIP. I have adduced it merely to illustrate the effect which the deference of Christianity for its head, had upon the Law of Nations at that time; and could we be so happy as to expect that in such a situation the conduct and motives of a Pope, and a king of France, would *always* be wise and pure, I know of no Institution since the beginning of mankind, so well adapted to preserve its order, and consequently its happiness. (*o*)

Such wisdom and purity, however, are hardly compatible, and certainly not very intimate with our

(*n*) Mat. Par. 299.

(*o*) See some judicious Observations of Mr. Barrington on this Subject.—Observ. on the Stat. p. 510.

natures, and the good which the Popes have ever done, has been far overbalanced by their power of doing mischief. But at the same time it must be owned, even by their enemies, that a vast body of cases might be brought forward, in which this remarkable Law of Nations, such as I have described it, was administered in some measure according to the true spirit of its theory, and we may often observe the Father of CHRISTENDOM, interfering, not improperly, with mediation, advice, and correction, in the affairs and morals of all the neighbouring sovereigns.

We have occasion to remark this at a very early period in the firm and wholesome correction given by St. AMBROSE, Archbishop of Milan, to so powerful a monarch as THEODOSIUS, after he had indiscriminately murdered seven thousand men at Thessalonica, without distinguishing the innocent from the guilty.—Little conscious of his crime, the Emperor approached the church of Milan in order to pay his accustomed duties, when he was met by the Prelate, who absolutely refused him admittance, and bespoke him in the following terms. “ You seem not to understand, Sir, the greatness of the murder you have committed; and perhaps the greatness of your Empire will not suffer you to acknowledge your offence. But our original is the dust, whence we were taken, and to which we must return. It is not fit you should deceive yourself with the splendour of your purple, or forget the weakness of the body that is covered with it. With what eyes will you look upon the house of OUR COMMON LORD? With what feet will you tread his holy pavement? Will you stretch forth those hands, still dropping with the blood of that unjust murder, and therewith take the holy body of the Lord? And will you put the cup of that precious blood to your mouth, who have shed so much  
“ blood

“ blood by the hasty decree of an angry mind ?” In this animated strain did a minister of religion proceed to rebuke the most tremendous monarch of the earth, till he sent him home covered with shame, and dissolving into penitence and tears at the recollection of the cruelty of his public conduct ; (p) let those who are acquainted with the conduct of the Priests of Pagan times towards kings and generals, draw the proper inference.

Another very complete example is to be found during the ninth century, in the history of Lorrain. **LOTHARIUS**, the first king of that country, having repudiated his wife, in order to marry a mistress, **NICHOLAS I.** who then filled the papal chair, interposed for the sake of the good order of which he conceived himself to be the guardian. He told him that his religion neither permitted him to divorce his wife, nor to marry his concubine ; and threatened him with the severest censures of the church unless he returned to his duty. Lotharius replied, and the Pope thus opposed, sent two Legates immediately into his dominions, who summoned a Council, and determined the matter in his favour. Nicholas dissatisfied with their determination, deposed, of his own authority, the two Archbishops, of Treves and Cologne, and sent another Legate, who gave the affair a re-hearing, and determining it against the king, he was at length obliged to separate himself from his mistress. (q)

The story is little interesting. Nicholas might possibly have had selfish views in doing even what he did, and Lotharius actually succeeded better with his successor **ADRIAN II.** I mention it, merely to shew the difference which it exhibits, between the Law of Nations of Europe at this time, and that of

(p) Bingham. Antiq. of the Church, B. 16. ch. 3.

(q) Velly 1. 323.

all other Countries, and of Europe itself, before the firm establishment of Christianity. No nation of antiquity, nor any that was a stranger to Christianity, offers an example of such submission to a man, of whom, as a temporal prince, they were wholly independent.

The history of the succeeding ages, is pregnant with cases of the same kind. Of mediation, (not merely as a friend whose own interest is probably concerned, but in the capacity of a father, equally interested for all his children, and anxious to make them fulfil the duties most acceptable to God,) we have an eminent and not ineloquent example in a letter of Pope Alexander, recommending peace between the kings of France and England in 1162. “ Among other good things,” says the letter, “ which render men amiable to their neighbours and pleasing to God, we believe that to be most acceptable, which infuses charity into the heart, and operates as a bond of union to different minds. This good is PEACE, by which hatred is dispelled, rancour allayed, envy driven away, and anger shaken off; which pacifies the mind, conciliates the heart, assuages the breast, and assimilates tempers. This is what we seek to plant, to propagate, and to nourish, among the sons of the Church; this is what we wish to bring to fruit, among Kings, Princes, and Great Men.” (r)

If we pause for a moment in this place, and recollect the bloody injunctions of the religion professed by the Conquerors of Europe before their con-

(r) Inter cætera bona, quæ hominem amabilem proximis, et placidum Deo reddunt, illud specialiter acceptum fore credimus, quod caritatem cordibus inserit, et animarum vinculum operatur. Hoc, inquam, bonum, Pax est: quæ procul depellet hodium; rancorem abjicit; fugat invidiam; excutitque livorem; pacat mentes, corda conciliat, feremat pectora, et sociat voluntates. Hanc, &c. &c.—Rymer, 1. 21. et infr.



version, and the manner by which they were commanded to render themselves acceptable to ODIN, (s) the chief of their Gods; we cannot but be sensibly struck with the change, which a few centuries, under the influence of Christianity, had made in the maxims of the world!

The opinion entertained of the Pope's power, when properly used, appears also very forcibly in the affecting appeal made by HENRY II. of England, to the same ALEXANDER, ten years afterwards. He complains to him of the want of duty, and the ingratitude of his sons; that he has the misfortune to be forced to act, as if he hated his own blood; that although he could easily repress their rebellion, yet he cannot shake off the father, nor forget his natural affections so much as to have recourse to extremities. In this tribulation he approached the Pontiff, "whom  
" God," he says, "had raised to the office of Shep-  
" herd over his people, and who though destitute of  
" temporal arms, is able to defend the patrimony of  
" SAINT PETER with the spiritual sword, and re-  
" quests his interposition to turn the hearts of chil-  
" dren properly towards their parent." (t)

The obligations of RICHARD I. to the Pope, in procuring his release from the prisons of the Duke of Austria and the Emperor, are well known. The former was touched in conscience on his death bed, and commanded his son to return the part of RICHARD's ransom which he had received as his share of the plunder. The young Duke, however, being possibly not so prompt as he ought to have been, in fulfilling the intentions of his father; INNOCENT III. who then held the See of Rome, writes to him a letter, the preamble of which describes with exactness the quality of parental Mediator in the affairs of the

(s) Vide Chap. VII. ad fin.

(t) Rym. I. 35.

world, with which as we have said the *theory* of the Ecclesiastical Establishments had invested this remarkable potentate. INNOCENT begins thus. “ In eo sumus officio, disponente Deo, constituti, ut singulorum et omnium salutem consulere debeamus; et universis petentibus, tam majoribus quam minoribus, in executione justitiæ providere.” (u)

He goes on to exhort him, as he values the salvation of his Father, or his own, to restore the money, and threatens him with excommunication in case of disobedience. The letter had so far the desired effect, that he restored the hostages which had been given for the payment of the money, and would have given back the money itself, had not death prevented the performance of his promise.

In 1193, the same sort of interposition procured liberty to the three daughters of TANCRED, king of Sicily, who had been carried off and retained captive unjustly by the Emperor HENRY VI. (w)

In 1214, Simon Montford, the Conqueror of the Albigeois, having unjustly detained the infant son of the king of Arragon in prison, his mother appealed for succour to the Pope, who interposed his authority in her favour, and Montford was forced to yield up the child. (x)

Lastly, in 1337, upon the breaking out of the war between EDWARD III. and PHILIP of VALENTINOIS; the English monarch before he took the field, thought it right to lay his pretensions before the sovereign of Rome; he complains to him of having been unjustly deprived of the crown of France; of affronts offered to his Ambassadors; of the conduct of the Nobles of the realm, who in their capa-

(u) Rym. 1. 102.

(w) Burgin. 1. 507.

(x) This circumstance obliges even Voltaire to confess, “ Qu’il y-avait des moments bien honorables pour la cour de Rome.”  
 “ —Esp. des Nat. ch. 60.

city of Judges, had deprived him, when a minor, of his rights; of the king's favouring the revolt of the Scotch; and in short, lays the whole of his grievances before him as if he had been regularly chosen umpire between them. (y)

It is not improbable that the custom of APPEAL to neutral powers, on the breaking out of war, (z) arose from this influence of the Pope in the Christian republic. Habituated to lay their grievances before him on all occasions, and to justify their conduct when it appeared to be necessary; the transition was easy from him to other princes; and the connection between the various potentates growing closer and closer, they continued from a sense of its utility, a custom which possibly would not have been thought of, (or at least not so soon,) had it not been for the deference they paid to him at a time when knowledge of one another was not so universal.

The war waged by EDWARD in support of his claim was actually delayed for some months, after it had been resolved upon in Parliament, expressly out of reverence for the holy See which had advised such a piece of moderation; (a) and after it broke out, we find the Pope through his Legates not wanting in the care which he had professed to have for his children. It was not their fault, that the bloody battle of *Poitiers* was not prevented; and as it was, it was retarded for the space of one day by negotiation. On the morning intended for the battle, says Froissart, when the troops were drawn up, and

(y) Rym. 4. 826.

(z) See Chap. X.

(a) Concessimus etiam ob reverentiam dictæ sedis atque vestram, quod citra primum diem mensis Martii, proximo futurum (nec post, donec contrarium demandetur ex parte nostra, vel per nostros) nulla fiat Invasio, nec prefato consanguineo nostro, &c. &c. malum aliquod inferatur.—Rym. 4. 833.

every officer encircled with his men ; the *Cardinal Perigord* came to the king on full gallop from Poitiers, whence he had set out at day break, and with joined hands, and in the name of God, and humility, conjured him to spare the effusion of so much blood as might be spilt, by endeavouring to end the matter by negociation. (b) This prayer was granted, but though his endeavours did not succeed, it does not the less prove the deference with which the interference of the christian church, was always regarded in the most critical affairs. On the other hand, the Priests of antiquity, were often themselves the Generals of the armies, or, if not, were busied in inspecting the sacrifices, and thereby promoting, as far as in them lay, the operations of war. No case presents a more manifest proof of the change which the customs of Europe had undergone.

The same battle of *Poitiers*, furnishes us also with eminent proof of a custom, in which the papal censures must have been of high service to the affairs of the world. PETER of BOURBON, one of the most illustrious Nobles of the realm, perished there under an excommunication, which had been laid upon him *at the suit of his creditors*, with whom he was deeply involved. The filial piety of his son, Prince Lewis, obtained the removal of his sentence, in order that prayers might be said for the good of his soul : a favour, however, which was only granted, *upon his engaging himself to satisfy the debts of his father*. (c) At the siege of Montpelier also, the interference of Religion was visible to the meanest observation.—Taken by the duke of Anjou, that savage Conqueror condemned six hundred of the citizens to death in different ways. Two hundred

(b) Froissart. v. 1. ch. 161.

(c) Henault. Hist. Abreg. 1. 322.



were doomed to perish by the sword ; two hundred by the halter ; two hundred by the flames ; and the whole of their posterity were to be reduced to slavery.

The consternation which such a sentence, upon so large a body produced, was general throughout the city. Nothing was heard but the most piercing and melancholy cries ; the men given over for lost, were intreating pardon ; the women, with dishevelled hair, were beating their breasts. In the midst of this desolation, the CARDINAL of ALBANY, assisted by a Dominican Friar, addressed himself to the Duke in the language of his religion. They did not excuse the faults of the city, but rested their intercession entirely upon the sublime doctrine of forgiveness of injuries, the flower of the Christian morality, and which it was reserved, they said, for Christianity alone to make known to the world. The duke was moved at their representations ; the bloody punishment to which he had condemned the city, was changed into a fine ; and from that time, remarks the historian, the military punishments in France appear to have been milder. (d)

Another considerable advantage derived to Sovereigns from the Pope's power, appears in the manner in which the observation of Treaties during these times was enforced. As the obedience of men gave the most effectual support to the decrees of the Pontiff, it became common with them, when they entered into engagements, to subject themselves to the penalties of an *Interdict* in case of failure, by which the power of a prince was blasted in its vigour ; and could the frailty of mankind have ensured a proper use of this prerogative, it would have continued one of the most powerful GUARANTIES for the preservation of good faith, that has ever been devised. Used

(d) Villaret, i. 531, 532.

as it was, it displays another singular effect of the *Christian* Institutions upon the customs of the world.

But of all the examples of that regularity which was seen in Europe in consequence of its religious union, those are the strongest which are exhibited by the **ŒCUMENICAL COUNCILS**. These were so called from their being supposed to relate to the whole habitable earth, the word œcumenical, (οἰκο-μενικος) signifying ad orbem terrarum pertinens. (e)

They were accordingly composed of **DELEGATES** from every nation of Christianity, and under this appearance, Europe may fairly be said to deserve the appellation which has sometimes been bestowed upon it of a **REPUBLIC OF STATES**. (f)

Voltaire has, not improperly, called these Councils the **SENATE OF EUROPE**; (g) and in fact, they were composed of a **SET OF SOVEREIGNS**, all intimately connected together; instructed in one another's customs; obeying one common law; and in some measure, governed by one common interest. They were not merely formed of *Ecclesiastics*, nor did they meet solely for the discussion of points of faith. The Emperors of the East and West, and other crowned heads, have sometimes appeared at them in person, and almost constantly by their Ambassadors; and their rank and seats were marked out, with as much regularity as a subject of so much nicety could permit. Points concerning the whole public weal of **EUROPE** were discussed in them; such as the interest, and the precedence of nations; the conduct of princes; all articles of faith; the interests of religion; and the defence of the faithful against the Infidels.

(e) Maimb. Hist. Greg. le grand. 108. & Du Conge Gloss.

(f) De Callieres. Man. de negocier. Ch. 3.

(g) Esprit des Nat. Ch. 67.

Their constitution and origin are to be ascribed entirely to the effects of CHRISTIANITY. They were at first no more than *Convocations of the Clergy*, sometimes of a particular State, or, at most, of those who acknowledged some of the patriarchal churches as their head. They were at first also, absolutely confined to religious matters, the superintendence of which they derived from the Apostles, and which they held insulated among themselves, let what would be the public religion, or toleration of the state they happened to be in. (h) CONSTANTINE however, having adopted Christianity as the national Church, he claimed to himself the superintendence of its discipline, so far at least as the privilege of calling public Councils was concerned; and when his Empire was split into different kingdoms, the Sovereigns imitated his example, and for a number of years reserved to themselves this important right. Thus CLOVIS, who was at the head of the greatest Western dominion of his age, called the Council of Orleans in 511 of his own authority; the Bishops that composed it, are said to have requested him to ratify their decisions. Et par malheur, adds Pasquier, nulle mention de l'Evesque de Rome. (i) PEPIN also, and his brother CARLOMAN, though only Mayors of the Palace, exercised the same privilege two centuries afterwards. (k)

Under Charlemagne, the prerogative, as may be supposed, was rather extended than curtailed; accordingly, at the Council of Frankfort in 794, he presided in person; received the decretals of the Fathers; *confirmed* them, and ordered their publication; (l) and when the vast territories of this

(h) See Puffendorf. sur la Mon. Spir. du Pape. 17, 22. et infr. Putier Constit. of Germ. by Dornf. 1. 20.

(i) Recherches de la Fr. L. 3. ch. 7.

(k) Pasquier. 5. 10. Hen. Hist. Chron. 1. 120.

(l) Plessel Droit pub. d'Allemagne, 1. 35.

prince came to be divided into the two great kingdoms of Germany and France, the Sovereigns of the former, who for the most part reserved the title of Emperor of Rome, continued for some time to exercise this prerogative. (*m*)

It was not unnatural however for the Ministers of religion, who held their ministry from God alone, to be jealous of the interposition of temporal power, and by degrees they acquired, or rather resumed, the right of assembling themselves at the call of their Chief. CHARLES the BALD, favoured their views in France, and in a little time the Pope found himself invested with the exclusive privilege of calling assemblies of the clergy of particular States, *even without the consent of their Sovereign.* (*n*)

We have mentioned above, the great points of business which presented themselves to Councils thus called, for consideration: but a short attention to the proceedings of two or three of the most famous of them during the ages before us, will render their effect upon the laws of Europe still more visible. The two councils of Lyons give us the idea of an almost perfect COURT or PARLIAMENT of Christendom, in which the affairs of Sovereigns were discussed, and Sovereigns themselves proceeded against, under all the forms of a regular trial and sentence. The investigator of history, is not to be told the bitter contests of the famous FREDERICK II. and the See of Rome, which gave rise to the first of them. INNOCENT IV. who at that time held the seat of St. Peter, having sustained the quarrel with various success, and being at length driven from Italy by the troops of the Emperor, resolved upon one last effort to decide the affair. His excommunications had hitherto had no effect, he found no secular prince

(*m*) Heifs. 1. 125. & Pfeffel Droit pub. 1. 192. where he enumerates the rights of the Saxon Emperors.

(*n*) Henault, 1. 120.



strong, or willing enough, to take up his cause ; and he fell upon the daring expedient of declaring the Emperor *dethroned*, in, and by the assistance of, an Assembly composed of the representatives of almost all the States of Europe. In this uncommon enterprise he trusted to the influence of religion to carry him through ; but the undertaking could only be conceived upon principles as vast and important, as it was daring in him to imagine them ; and the success of it upon those principles, put the Law of Nations in a light in which it had never before been regarded. It was at that time indeed, not new to consider Princes who were excommunicated, as deprived of their temporal rights, and liable to be attacked by any secular power that was called upon, by the Pope : but that a Congress of Sovereigns and Ecclesiastics, should bring to a solemn trial, and sit in judgment upon another Sovereign, who held his rights by the same title as themselves, was in conformity with no one case that had hitherto happened, no principle that had yet been broached. The expectations of men were therefore fairly exalted, the contest became interesting, and the account of the proceedings of the Council, will shew the customs of Europe in a point of view never so thoroughly seen before, and never witnessed since.

The place of the Council was the first care of INNOCENT ; and he pitched upon *Lyons*, as the most central and convenient spot. It was surrounded as it were by Germany, France, and Italy, and was not very far distant from Spain, nor even from England. Hither then, he summoned the dignified Clergy from all the kingdoms of Europe, and invited their Sovereigns to appear there also, either in person, or by their Ambassadors. The object of the meeting which he at first avowed, was to consider of the abuses of the Church, and the defence of Constantinople, then threatened by the Turks. The Ecclesiastics

fiastics universally obeyed, his summons, and of the lay Sovereigns, there appeared the Emperor of Constantinople BALDWIN II. and the Counts of *Provence* and *Tholouse* in person; and by their Ambassadors, the Emperor FREDERICK, the kings of *France* and *England*, and other inferior Powers. The Sovereignty of the City was yielded to him by the Archbishop, at that time its temporal Lord, and the Knights Templars, (themselves another Sovereign power) formed his body guard.

At the first days sitting, little was done. Many abuses of the Church were proposed for consideration; the patriarch of Constantinople complained of a diminution in the number of his Suffragans, and the English wished to call the attention of the meeting to the canonization of Saint Edmund. The Pope however observed that there were much more pressing matters to employ their care.

There was at that time present on the part of the Emperor, THADDEUS of SUSSA, a man of consummate prudence, and singular eloquence, who united in his own person, the capacities of Soldier, Civilian, and Judge of the Palace. (o) This man knew well the difficulty of the charge allotted to him; he had to contend with an enemy of tried abilities and vigour, whose hatred, by having been pushed to the utmost, was capable of every thing; and who fought with weapons, not only the most powerful, but which he himself was not permitted to wield. He had nothing to rely upon in the exercise of his function, but coolness and patience in suffering what he could not resist, and a firm promptitude to seize every possible advantage. He quickly perceived what was meant by *matters more pressing*; but as it was his business rather to avoid, than to provoke the contest, he affected not to understand

(o) Mat. Par. 663.

them; and to evince his master's zeal, he proposed that he should do his utmost towards the union of the Roman and Constantinopolitan Churches, and should undertake a Crusade in person. "O! how many and how great are his promises!" replied the Pope, "never and no where performed, or to be performed! They are now made merely to elude the stroke of the axe which is uplifted, and which will soon fall upon the root of the tree. But were I disposed to listen to him, where can he look for friends who will be his securities." (p) The Ambassador immediately pointed out the kings of *France* and *England*. "By no means," replied the Pontiff, "the Church will then have three powerful enemies instead of one; let him perform the conditions he has so often sworn to and I will then believe him." Thaddeus, whose instructions did not extend to this point, and had not time to prepare an answer for so important a proposition, was forced to abandon it in silence and sadness. (q)

This was all that passed during the first days sitting. In the next however, the Pope entered the Church of St. John, arrayed in all the pomp of the priesthood, and with many sighs and tears bespoke the Assembly once more. "O ye," said the afflicted Pontiff, "who are passing through life, attend and observe, whether any sorrow is equal to my sorrow." He continued a discourse, not ineloquent, in which he compared his five greatest misfortunes to the five wounds of Christ. The first of them was the inhumanity of the Saracens; the second the schism between the Roman and Greek Churches; the third the prevalency of heretical doctrines; the fourth the misery of the holy City; and the fifth (the chief

(p) The *Commonwealth* of Europe must have been brought into no inconsiderable regularity of shape, when such Securities could have been talked of.

(q) *Siluit contristatus, &c.* Mat. Par. 664.

object of his design) THE CRIMES OF THE EMPEROR. He accused that Monarch of heresy; of sacrilege; of perjury; of being the enemy of the religion he was sworn to protect; of intelligence with the Saracens, whom he had even established in his territories; and of a criminal intercourse with their women.

Upon this accusation, the Emperor's Ambassador rose up with a firm and intrepid air, and resisted every article of the charge. He observed that it was only for him who discerned all the secrets of man, to know whether his master was really a Christian or not; but judging from his outward acts, that there was every reason to suppose he was so, since he complied with the rites of the Church, and above all since he prohibited the vice of Usury, (retorting in this upon the court of Rome, which was supposed to be tinctured with it;) that as for intelligence with Saracens, and establishing them in his dominions, it arose from prudence, in as much as he gained a body of troops for his own defence, and spared the effusion of *Christian* blood; that with respect to their women, he had no personal intercourse with them, but employed them merely in shows, and had even dismissed them when he found his conduct not approved of in that particular. Lastly, in reply to the charge of perjury, which the Pope had endeavoured to prove from letters of the Emperor; he shewed from letters which he also produced, that his Holiness himself was equally guilty, and that his master was not bound to perform his part of a contract, which had not been fulfilled by the other party. He ended by humbly intreating the Assembly to accord him some delay, that he might send to his master and request him to hasten his appearance at the Council in person, which he had long expected; or to give him fuller powers than at that time he possessed, which would enable him the better to proceed.



ceed. The Pope refused his request. "I fear the  
 "snares," said he, "which I have endeavoured to  
 "avoid; I am not yet prepared to shed my blood,  
 "nor do I yet deserve a crown of Martyrdom."  
 At the instance however of the Ambassadors of  
 France and England, particularly of the latter, (be-  
 tween whose master and Frederick there was a close  
 affinity;) Thaddeus obtained a fortnight delay, and  
 the Emperor was summoned to come and justify him-  
 self in person.

The answer to the Summons was such, probably,  
 as Innocent expected; he pointedly refused to obey;  
 and said that he would never disgrace the Imperial  
 dignity so far as to appear before a Synod, assembled  
 for the purpose of judging him. It does not appear  
 however from M. Paris, from whom I have chiefly  
 extracted this account, that he made any protest  
 against the former proceedings of the Council; and  
 such at least was the opinion of their rights enter-  
 tained by its members, that the Emperor's obstinacy  
 is said to have alienated the minds of many of his  
 friends. In the course of the affair, we have farther  
 proofs of the power supposed to be inherent in these  
 meetings. A Council it seems had formerly been  
 summoned at Rome by GREGORY IX. in order to  
 proceed also against Frederick, and that haughty  
 prince had caused many of the prelates going to it,  
 to be arrested. A new ground of accusation was  
 made out upon this, which was treated as the height  
 of sacrilege, and the zealous Thaddeus in vain en-  
 deavoured to defend him, by shewing that he had  
 been ready to set them at liberty, had not the Bishop  
 of Palestine and others insolently thundered forth  
 excommunications against him. Innocent, (pro-  
 ceeding all along upon the acknowledged authority  
 of Councils to try the causes of Sovereigns,) de-  
 manded of the Ambassador what his master had to  
 fear from the judgment of good men if he was inno-  
 cent;

cent; and Thaddeus avowed the authority of the Court, by confining his objections solely to the members that composed it. He observed that he had every thing to fear from a tribunal wherein his enemies were more numerous than his friends, and where Gregory, the hottest of them all, was to preside. The Pope however was too able to continue the contest by argument, and perceiving the impression made upon the Assembly, he coolly replied that his defence would avail him nothing, and would only end in the merited DEPOSITION of his master. Thaddeus had also observed the effect which Frederick's refusal to obey had had upon the Assembly, (a spirit which had been ably encouraged by the crafty Pontiff,) and firm as he was, he therefore trembled at this menace. He again offered to speak but was refused a hearing, and perceiving the approaching victory, he endeavoured to avert its consequences by complaining of the paucity of members that composed the Synod. He also completely discovers to us the opinion entertained in those days of the power of Councils by actually *Appealing* to another meeting, more general, solemn, and impartial. He was answered that it was sufficiently a *general Council*, since it was composed of so many Patriarchs, Archbishops, Bishops, and Nobles, collected either in person, or by their Ambassadors, from all parts of the world; and the Pope proceeded, as the Vicar of Christ, to declare him guilty of sacrilege, and heresy, and, in consequence, to pronounce him excommunicated, and dethroned. In the preamble to the sentence, he has these remarkable expressions; that the Popes are established over all Christians, for the purpose of rewarding the good, and punishing the guilty, in virtue of which he releases the subjects of the Emperor from their oath of allegiance; he actually calls upon the Electors to proceed to a new election; and as for the kingdom  
of

of Sicily, as superiour Lord, he reserves its disposal to his own will.

This terrible sentence seemed to astonish the Council itself, and was heard, says the historian, with a kind of stupor and horror. The aspiring Pontiff however, who was the only person unmoved, (r) proceeded in concurrence with the Fathers to denounce the usual curses against Frederick, who was no longer styled Emperor, and after a number of other acts concerning matters *temporal*, as well as *Spiritual*, the Assembly separated.

Thus finished the celebrated Council of Lyons, the proceedings of which were of the utmost importance to the European Law of Nations, and which, as its power is wholly ascribeable to the influence of Christianity, (whether well or ill directed) has a fair title to be noticed in this place. The sentence which it dared to promulgate, was received in Christendom as legal and just; it was published in all due formality in England by HENRY III. the near relation of Frederick, and although that able prince contrived to keep together a strong party in the Empire, the rest of his life was passed in arms with indifferent success. The ecclesiastical princes of Germany, payed so much deference to the sentence, as to elect immediately a new king of the Romans, in the person of Henry Landgrave, of Thuringia; and when that monarch died, which he did in endeavouring to assert his rights, they still passed by the deposed Sovereign, and with the additional suffrages of many temporal princes, who had in general protested against the proceedings of INNO-

(r) In Imperatorem Fredericum, sine aliqua palpatione, vel dissimulatione, vel dilationis indultu, talem sententiam excommunicationis in pleno concilio, non sine omnium Audientium et circumstantium stupore et horrore terribiliter fulguravit.—M. Par. 663.

CENT, their choice fell upon William Earl of Holland, who survived him. (s)

Thirty years after this, the city of *Lyons* beheld another General Council assembled within its walls; in which, though the affairs treated of were neither of so much importance, nor of so much daring, as those which had employed the attention of the first; yet they were not less general in their effects upon Europe, nor less evincive of the union which these Councils always supposed it to be under, in contradistinction from the rest of the world. The object of the meeting was founded entirely upon the maxims of Christianity, and of Europe; the relief of the Holy Land: the union of Churches; the reformation of manners; and the temporal affairs of almost all the western nations. The members of it were numerous. Besides the Secular Powers, there were assembled near sixteen hundred Prelates: the Pope (GREGORY X.) presided in person; and PHILIP III. of France, who had begun to assert claims to the sovereignty of the city, after coming to meet and to express to him his good-will, left him a guard of Frenchmen under the command of Imbert de Beaujeau, one of his Nobles. Of Secular Powers, there were assembled, the King of *Arragon* in person; the Grand Masters of the Knights Hospitallers and Templars; and the Ambassadors of the Emperors of Germany and Constantinople, of France, England, and Sicily.

In this Assembly much was done for the COMMONWEALTH OF EUROPE. A reconciliation between the Greek and Roman Churches was effected; the election of the Emperor RODOLPH was confirmed; and the claims of ALPHONSO, King of Arragon,

(s) The account of the whole of these proceedings is to be found in Mat. Par. fos. 662, 663, to 679. Hei s. 1. 125. Burigny, 2. 88. 90 et infr. & Plessel 1. 394. Struv. Corp. Hist. Germ. 1. 466.



upon the Imperial dignity, renounced in form. The disputes of the Princes of Italy were taken into consideration; the form of election of the Pope himself was revised; usury was declared infamous, and excommunication was denounced against those who interrupted a Priest in publishing ecclesiastical censures against Sovereigns. (t)

It would extend this part of our enquiries to a disproportionate length, were we to examine the transactions of the other Councils that were held in Europe; and the intelligent reader would anticipate any inferences that could be drawn from them; exclusive of which, the account of the two Synods above-mentioned, demonstrates sufficiently the point with which we set out, that the profession of Christianity had gone the greatest lengths towards uniting the European nations under an intimate and close alliance, which, but for that, would never have existed. The only institution to which I can compare these meetings of the Powers of Europe, is that of the AMPHICTYONS in Greece; for which, however, there were particular reasons of another nature, drawn from the community of origin in the Pelasgic States; their similarity of language and laws; and their inhabiting an almost insulated country, the political interests of which were in constant opposition to that of their surrounding neighbours. Religion, therefore, did as much for Europe, as a community of race, of language, of laws, and of political interests, did for Greece; and so great was the opinion of the utility of these General Councils, that it seems to have been the received doctrine, according to M. Paris, that they should be held as a *matter of right* as often as the Jubilees, (which in the ages before us was every fifty years) (v) when, to use his ex-

(t) Hist. des Conciles. t. II. 950 et infr.

(v) In quo decretum et scriptum est, quod non deberet *de jure* concilium generale celebrari, nisi semel infra quinquaginta annos, quod est spacium clausum jubileo. Mat. Par. 662.

pressions, “omnia collapsa habent reformari et in bono statu restitui et solidari.” They were of still farther use, in as much as they were the instruments for reforming the abuses which proceeded from the Papacy itself; whose authority was always supposed to be inferior to theirs.

This was a point of so much importance to the papal interests on the one hand, and the interests of Europe on the other, that it was often contested with great energy: the event, however, declared in favour of the latter, as in reason it ought to have done; since, according to an antient author, whatever power may have been attributed to the Pope, it should be considered as extending over individuals, not over the whole collective body of the Church; “*Potius Papa Ecclesiæ, quam Ecclesia tota Papæ obedire cogetur.*” (w)

This indeed had been in some measure acknowledged by the proud spirit of GREGORY VII. himself, who professed to appeal to a General Council to judge between him and the Emperor Henry IV. Innocent III. also allowed that he could not decide upon the divorce of Philip Augustus, without the support of the same sort of Synod. Their superiority was solemnly adjudged in France by one of the articles of the pragmatic sanction of Charles VII. 1437: (w) and by the Council of CONSTANCE it was at length finally settled against the See of Rome.

In that celebrated Assembly we find it decreed, in the first place, that a GENERAL COUNCIL, representing the whole Catholic Church, derives its authority from CHRIST himself, and that to such an authority every one “*cujuscumque status vel dignitatis, etiam si papalis existat,*” is bound to yield his obedience. It was decreed in the second place, and again without any reserve of rank, that whoever re-

(w) Pasquier. Recherches de la Fr. L. 3. Ch. 27.

refused this obedience, should be condemned to a merited penitence, et etiam “*ad alia juris subsidia, si opus fuerit.*” (x) What these *alia jura* were, may be farther collected from the proceedings of the same Council, (carried, as it is said, *in spite* of the Cardinals,) (y) which actually deposed JOHN XXIII. from the Pontificate; (z) and from those of the Council of Basle, held a few years afterwards, when EUGENE IV. met with the same fate. (a)

But with whatever appearance of regularity and advantage, the power and constitution of councils may seem to have been attended, it must be owned that Christianity, by being abused, gave rise to maxims, too long received, which it would be an outrage upon common sense to endeavour to justify. The Pope’s power to dispose of the Crowns of Christendom at will, as the successor of St. Peter; to grant new territories to the conquerors or discoverers of them; to annul treaties, when contrary to the interests of Rome; to absolve men from the most solemn contracts; or to preach crusades against all who refused to acknowledge his authority: these, it would be as vain, as it would be ridiculous, to defend with gravity. Fidelity, however, to our undertaking, demands that we should enter upon the detail of them; and ridiculous as they are, they are yet an eminent proof of the effect which any religion, whether pure or corrupted, will always have upon the customs of the nations that profess it.

The foundation of the whole of the Papal usurpations in these points, is to be traced to the forged

(x) *Labeo Concil. Collect. ap Du Mont. 4. 25.*

(y) *Pfessel Dr. Pub. d’All. 1. 617.*

(z) He was declared guilty of Heresy, Simony, and Mal-administration, and cited to surrender himself within a certain time, “*ut ipse cum suis fautoribus in propriis personis compareant, sententiamque suam audiant,*” &c. *Du Mont. 4. 27.*

(a) *Puffend. sur la Mon. Sp. du. P. 55, 56, et inir.*

collection of the decrees of General Councils, and the letters of the Bishops of Rome, supposed to have been made by ISIDOR, Bishop of Seville, a Prelate of learning, who, it was known, had made such a collection in the seventh century. Two hundred years after that period, there appeared in the world a book, said to be this identical one, which had not till then been universally known, and which contained matters of the very deepest importance to the whole constitution of the Church, and the maxims of all the European States; in other words, to the European law of nations.

Before the promulgation of this book, the Bishop of Rome had been in possession of no powers that interfered with other Bishops who were independent of his diocese. His pre-eminence, and his functions, had been confined to his own Suffragans; and so far was he from claiming any authority over the temporal Sovereigns of the world, that he was himself dependent upon the Emperors for his very election. That he was the true and only successor of SAINT PETER, or that he derived more power from the Founder of CHRISTIANITY than other Bishops, who all sprang from the same source, had not then been thought of: on the contrary, all Bishops were supposed to be coequal; and so far was the idea carried, that the whole Church has been thought to have been but one Bishopric, wherein every single Bishop had an equal concern in the whole. “Episcopatus unus est, cujus a singulis in solidum pars tenetur,” (b) In this sense, therefore, the authority of the Bishop of *Eugubium* extended as far as that of the Bishop of *Rome*. *Rhegium* was equal to *Constantinople*, and *Tanis* to *Alexandria*; nor are there wanting instances of Bishops exercising their episcopal functions in all great ecclesiastical matters, in dio-

(b) Cyprian de Unit. Eccles. ap. Bingham 2. 5.



ceses not belonging to themselves, by virtue of the community, and equality of their power. (c) Hence before the establishment of *patriarchal* churches, among other titles which were given to them, we frequently meet with that of *Αυτοκεφαλοι*, or men who acknowledged no head; and even after the division of the Church into Patriarchates, many of these independent Bishoprics remained, such as Bulgaria, Cyprus, and Iberia. (d) The reputation, however, of the Roman City, gave importance to its Bishop in the minds of the world; for it was still in the power of that illustrious, though fallen capital, to communicate splendour and consequence to those who possessed it. In the Council of Chalcedon, therefore, under the Emperor MARCIAN, the title of CECUMENICAL or UNIVERSAL Bishop was given to Pope Leo, by six hundred Prelates. By that Pontiff, however, it was neither accepted nor refused, although from that time the inferior Clergy began to address themselves to him as *Sanctissimo et Beatissimo Universali Archiepiscopo, et Patriarchæ Magnæ Romæ, et Sanctæ Universali Synodo*. (e) According to some, it was the Emperor Phocas who bestowed upon him the title of *OEcumenical*; and certain it is that from the time of CHARLEMAGNE, who might almost be said to have been the Emperor of Europe, and who revived the title of Emperor of the West, he had been endowed with the exclusive privilege of consecrating that august Sovereign. This contributed not a little to raise him in dignity above his peers; and from all these circumstances, the eyes of men were attracted to the antient capital of the world, in preference to the other Patriarchal Sees. (f)

It

(c) Bingham ib.

(d) Id. 2. 18.

(e) Pasquier. Recherches de la Fr. L. 3. Ch. 2.

(f) Upon the constitution of the Christian Hierarchy, see Tuffend. Mon. Spir. du Pape. For the precedency of different churches,

It was in this situation of things that the book above-mentioned appeared; and the little penetration and learning then extant, did not permit men to undertake a critical disquisition. The turbulence and jarring interests of the successors of Charlemagne, which made them of necessity court so powerful an aid as the Church was at all times able to afford, also contributed to the reception of the work.

By this remarkable collection it was made to appear, that the world had formerly agreed to consider the BISHOP of ROME as the successor of ST. PETER; and that as CHRIST had given the keys of Heaven into the hands of the Apostle, (g) so, as his successor, the Pope also received them; that all ministers of religion, according to the phrase of the prophet Zachariah, ought to be honoured as the apple of God's eye; that all spiritual persons, and their estates, ought to be exempt from the secular Powers; that the cognizance of all causes wherein religion could have place, such as matrimony, oaths, (*and therefore contracts and treaties,*) should belong to the Bishops, let what would be the rank of the parties, even though it were sovereign; (h) that from all Bishops, an appeal lay to the superior See of Rome; that the supreme Pontiff had the right to depose all Ecclesiastics, Archbishops, and Bishops, and appoint others in their stead; and lastly, that in virtue of the divine power thus committed to him, he pos-

churches, see amongst others, Sir Geo. Mackenzie on preced. p. 39. Pasquier. Rech. de la France, L. 3. Ch. 1, 2, 3. The latter favours the See of Rome, but without much success.

(g) St. Matth. ch. xvi. v. 18, 19, "And I say unto thee, thou art Peter, and upon this rock I will build my church; and the gates of Hell shall not prevail against it.

"And I will give unto thee the kingdom of Heaven; and whatsoever thou shalt bind on Earth, shall be bound in Heaven; and whatsoever thou shalt loose on Earth, shall be loosed in Heaven."

(h) Puffendorf. ut sup. 23.

ferred the wonderful prerogative of excommunicating Kings and Princes, and declaring them unfit to reign, the expression of God in Jeremiah being applicable to him, “ See I have this day set thee over  
 “ the nations, and over the kingdoms, to root out,  
 “ and to pull down, and to destroy, and to throw  
 “ down, to build, and to plant.” (i)

The arrogation of a power so stupenduous would, in other days, have excited the ridicule of mankind for its folly, or their pity for its madness; in these times, however, its effect was serious; and, from the causes above-mentioned, it soon began to be received as law.

That the Temporal Powers should not have immediately resisted it, is not wonderful, since, in all probability, they were ignorant of its extent, and some of them possibly of its existence. Such indeed had been the opinion and weight which almost all Bishops had acquired, that in the primitive church they had been universally chosen the arbitrators of men’s differences, and their judgments had been confirmed by the Imperial sanction, and rendered independent of the Secular Magistrate. (k) But that the body of the Church should receive it, is remarkable, since it altered its whole constitution, and surrendered up the independence of a vast number of powerful Ecclesiastics. Who the author of the collection was, has not been exactly ascertained; (l) but *Riculphus*, an Archbishop of Mentz, is

(i) Jerem. 1. 10.

(k) Euseb. de Vit. Constant. L. 4. 6. 27.

(l) Putter, in his account of this famous forgery, makes no mention of the name of the author, but merely speaks of the promoters of the scheme, and says it is probable he was some Bishop, &c. Constit. of Germ. 1. 98. 100. The very learned Pfeffel (upon what authority he does not say) calls him Benet Levita.

Droit. Pub. d’Allem. 1. 103.

said to have procured it from Spain in the beginning of the ninth century. In 863, the famous *Hincmar*, Archbishop of Rheims, adopted it as authentic. A Suffragan Bishop having appealed from his Provincial Synod to the Supreme Pontiff, his appeal was allowed upon that ground; and in the middle of the twelfth century its authority was solemnly acknowledged by the decretal of *Gratian*, the faults of which, according to the President Henault, men have hitherto in vain attempted to expunge. (m) From the time of the publication of this work, the Court of Rome proceeded systematically in its usurpations, and aided by the religious deference and superstition of unenlightened men, arrived at length, in the period before us, to that wonderful height of power, which interfered with, and almost governed the affairs of all the Christian nations.

It was in the eleventh century that these usurpations, which had thus before taken root, were first brought into life and strength; and the well-known enterprizes of the aspiring *HILDEBRAND*, so celebrated under the name of *GREGORY VII.* by humbling both the clergy and the laity of Christendom, seemed to emulate the power of the ancient Emperors.

It does not fall within our subject to trace the steps by which he proceeded; it is sufficient to remember, that he was the first of the Pontiffs who

(m) Hist. Chron. i. 193. Puffend. Mon. Spir. du Cape 28. It was not till the reformation had liberated one half of Europe from the yoke of Rome, that men began actually to question the authenticity of this supposed book of *Isidor*; a literary contest was then broached upon it, in which the Catholics were obliged to confess that the work was spurious, and that there were above fifty interpolations in the decrees of the Councils. Putter. ut sup.

It is of little consequence to the subject before us, whether the collection was genuine or not; it being sufficient for our point, that the work was so received.



arrogated to the See of Rome the right of investiture ; by the extension of which, every Sovereignty of Europe yielded to the successor of SAINT Peter, (as he was now supposed to, be one of the most ample and important of their prerogatives. (n)

GREGORY was the first also who exercised the pretended power of deposing Princes, (o) and of granting or withholding kingdoms in consequence of the Christian world's being thought to be the patrimony of the great Apostle ; a power of coercion and of remuneration so abundant, that he considered mankind as more intimately dependent on him than they had ever been upon his predecessors, and confined, in consequence, to himself, what had hitherto been extended to *all* Bishops, the distinguished name of *Papa*, or *Father*. (p)

The manner in which he commenced his operations evinces the boldness of his spirit ; and the consummate knowledge he had acquired of the minds of men. The strongest and most vigorous Sovereign in Europe, both in dominion and personal character, was the first object of his attacks. And indeed, the constant opposition of their interests, and the thousand jarring claims that arose between them, made it necessary for him to humble the Emperor, before he proceeded to the rest of the Potentates around him. The doctrines of Isidor's collection were, therefore, every where promulgated ; (q) the reverence paid to the memory of

(n) Pfeffel i. 264, 291.

(o) Heiff. i. 76. et infr. Maimbourg. vie de Greg. le Grand. 163.

(p) Le Cointe Annales. Greg. VII. Pasquier. Rec. de la Fr. i. 3. imagines *Papa* to be a contraction for *Pater Patrum*.

(q) Les fausses Decretales que la Diacre Benoit Levita avoit forgées, sous le nom d' *Isidorus Mercator*, et quel' Archeveque Riculfe de Mayence repandit en Allemagne, furent erigees en

SAINT PETER, was transferred to the crafty Pontiff; and he succeeded in tearing from Henry IV. the right of Investiture, which, it was held, could not properly belong to any one not in holy orders; confounding in this, the right to invest a man with the spiritual character of Priest, and the temporal right to a particular benefice. (*p*) In the course of the contest, we have reason to observe the marked progress which the sense (though a mistaken one) of the Christian religion had made in the hearts of men. The Princes of Germany, while they defended most strenuously the independence and rights of their Sovereign, agreed in a position as universal, that *apostacy* from the Christian faith was a fair ground for deposition. A letter, addressed to Gregory from the Diet of Worms, remarks expressly, that according to the tradition of their fathers, a Sovereign can only be judged by God himself, though they acknowledged that he may be deposed for one crime, namely, that of *abandoning his religion*. (*q*)

As the active spirit of Henry, however, had not permitted him to part with this important prerogative, without a long and vigorous resistance, Gregory had recourse to those powerful weapons with which the Pontiffs had now begun to arm themselves effectually; and in the year 1076, he thundered down upon the German Monarch the sentence of excommunication, so futile, when unsupported, but so dreadful, when seconded, by a sense of religion among the laity. In the preamble to this terrible sentence, he addresses his Apostolic predecessor, and tells him, “ he knows he was

loix fondamentales de la Constitution Ecclesiastique. Pfeffel.  
1. 103.

(*p*) Puffend. ut sup. 1. Heiff. 1. 76. 77.

(*q*) Hen. Hist. Chron. 1. 170.

called

called against his will to the government of the Church, and would rather have led a wandering and humble life ; (r) but nevertheless, being invested with power for the sake of Christianity, he thinks it right to punish its enemies." In consequence of this, the Emperor, it is well known, was forced to give way, abandoned by men whose religion would not permit them to obey him; another Emperor (Rodolph) was chosen in his place, (s) and he was obliged to submit to the most abject humiliations, before he could reinstate himself even in a part of his former power. (t)

From that time, excommunications and depositions were dealt forth largely, and with various success, by the Court of Rome; and, during the period we treat of there was hardly a Sovereign in Europe who did not feel the weight of this wonderful power. One of the most remarkable examples of the insolent confidence in the opinion thus raised by the Popes, appears about a century afterwards, in the conduct of CELESTINE III. who was then

(r) Baron. Annales. an. 1076. Labeo. Concil. Collect. 10. 24.

(s) Heiff. 1. 80.

(t) The following is the exulting and proud account given by Gregory himself to his Clergy, of the miserable state to which he had reduced the most powerful Monarch of the world; though quoted in other works, it comes too obviously within our subject to pass it by :—" Per triduum ante portam  
" castris, deposito omni regio cultu, miserabiliter, ut pote  
" discalceatus et laneis indutus persistens, non prius, cum multo  
" fletu Apostolicæ miserationis auxilium et consolationem implorari destitit, quam omnes qui ibi aderant, et ad quos rumor  
" ille pervenit ad tantam pietatem et compassionis misericordiam movit, ut pro eo multis precibus et lacrymis intercedentes, omnes quidem insolitam nostræ mentis duritiem mirarentur; non nulli vero in nobis, non Apostolicæ sedis gravitatem, sed quasi tyrannicæ feritatis, credulitatem esse clamarent."

Epist. Greg. Baron. an. 1077. Labeo. Concil. Collect. 10. 158.

eighty-six years of age. The Emperor Henry VII. coming to Rome, to be crowned and consecrated by the hands of the Pontiff, knelt down with devotion before his chair, to receive the diadem which Celestine had placed between his feet; and no sooner was it fixed on by the hand, than it was struck off by the foot of this proud old man, who left it to the Cardinals to take it up, and restore it to the Emperor.

Baronius, in relating this action, confesses it was indecent, but excuses Celestine, by observing that it was merely a display of his legal power, to confer, and to take away the Imperial Crown. (v)

Hitherto however, the ambition of the Holy See had been confined to matters merely spiritual; or if it had contrived to attain to almost sovereign power over the world, it was through the intervention, and by a crafty management of its prerogative in things, as they were called, divine! But the year 1300 beheld the papal pretensions, stripped of all disguise, and openly aspiring to the exercise of supreme power in *temporals*, as well as *spirituals*, under BONIFACE VIII. That Pontiff is described as able, proud, violent, and boasting; and having observed the almost uniform success of every design which the Court of Rome had conceived, when backed by superstitious deference, he thought it needless to proceed with the management and caution of his predecessors. He therefore openly laid claim, as Vicar of Christ, to supreme authority over all the Monarchs of the earth, in things *independent* of religion. He appeared on the celebration of the first jubilee at Rome, (when it was supposed that there were 200,000 pilgrims from all parts of Christendom within the walls,) in the habit of a lay

(v) Baron ad an. 1191.

Emperor;



Emperor ; a crown upon his head, a sceptre in his hand, and the imperial buskins upon his legs. He continued alternately to shew himself, now arrayed in the habits of Pontiff, now of Emperor, in order to prove to the world that he united the *temporal* as well as the *spiritual* supremacy in his own person. Had he done nothing more than this, he would only have attracted the ridicule, or possibly the resentment, of his neighbours ; but his nature was too aspiring to be contented with the mere ensigns of the power which he grasped at, and he immediately engaged in one of the hottest contests that had ever agitated the Papal See. It attracted the eyes of all Europe, and employed the utmost exertions of the most powerful of its Monarchs, and therefore well deserves to be mentioned here.

Philip IV. surnamed the Handsome, at that time filled the throne of France ; a Prince also of ability and violence, and of a spirit particularly independent. Between him and Boniface there were many subjects of difference, more especially concerning the government of the French Clergy, and the right of taxing them at pleasure, to which the Pope pretended, and which the King absolutely forbade. Philip also had made an alliance with the King of the Romans, the declared enemy of Boniface ; and, for this, his Ambassador at Rome was loaded with the most virulent invectives against his master. The Ambassador replied with vivacity ; he ventured to reproach Boniface himself with the many scandals of his life ; and observed, that he saw with grief the evils which his ill-placed pride, and unfounded claims, would occasion, if he embroiled himself with a Prince, equally informed of his rights, and jealous of his authority.

This was the first blow. The Pope sent immediately into France the Bishop of *Pamiers*, a Legate

gate whose character very well represented his own, and who behaved with such insolence, and denounced such terrible things in the name of his master, that being born a subject of France, Philip thought proper to order him to be arrested, and delivered over to the Archbishop of Narbonne, his Metropolitan, for punishment. Outraged at this, the Pontiff immediately issued forth his Bulls, with which he thought to destroy the offending Prince; and, by the first of them, commanded him in peremptory terms to send the Prelate to Rome for judgment; which being nothing but his legal privilege, was instantly complied with. Determined however to assert his claims to the utmost, he sent forth another, beginning with these remarkable words: "*Fear the Lord, and keep his commandments. We chuse to acquaint you, that you are subject to us in temporal as well as in spiritual matters;*" which so offended the King, that, thrown quite off his guard, he forgot the dignity with which a Monarch ought to defend his rights; and instead of calmly shewing the futility of his pretensions, he imitated, or exceeded in his answer, the insolence of which he complained. It begins thus: "*Philip by the grace of God, King of France, to the pretended Pope Boniface, little or no health; we chuse to acquaint your folly that we are subject to no one in temporals, and all who think so must be out of their senses.*"

Boniface replied in a Bull, which contained an ample and sufficient display of the whole of his claims. "*Hear,*" says he, "*my son, the commands of your father; open your heart to the precepts of a master, who holds the place of him, who is Lord and master of all; receive, with pliability, the advice of the holy Church your mother; execute, with fidelity, her orders, and submit, with respect to her will, that is, to ours.*" He then enters upon the detail of disorders in his kingdom, many of which were purely  
temporal,

*temporal*, such as those of the Mint; exhorts him to penitence, and summons his Clergy to Rome, to deliberate on a reform. In another Bull, addressed to the Clergy themselves, he repeats the summons, and calls them to consult upon the injustice done by the King and his officers *to the Nobility*, as well as to the Clergy.

Alarmed at this vigour, Philip actually began to fear lest the religious prejudices of the age should support the Pontiff, and by that means destroy his whole authority within the kingdom. To balance therefore the power that was thus rising against him, he resolved to have recourse to his people collected together; a resolution which was the first occasion of those celebrated Assemblies called the States General of France. (w)

The event of this Assembly was favourable to the King; and all the three Orders sent letters to Rome, to assert the independence of their Monarch: yet such was the reverence paid to a Power which was esteemed little less than Apostolical, that notwithstanding this, and the express prohibition of Philip, *forty* of his Prelates obeyed the Pope's summons, and attended the Council at Rome, which was absolutely expected to *dethrone* their master. In this Synod was promulgated the famous Decretal called UNAM SANCTAM, from its commencing with those two Latin words; in which it is *declared* and *pronounced*, that the Church is one, holy, catholic, and apostolic; that it has but one head, which is the POPE; that there are in this Church two swords, the *spiritual* and the *temporal*, both of which are wielded by the ecclesiastical power; that the temporal authority is therefore subservient to the spiritual,

(w) There have been warm disputes among the Critics on the French History, upon the chronology of these meetings; but see PASQUIER, *Recherches de la France*. L. 2. Ch. 7.

which is its founder and judge; that there cannot be a doubt as to this point, without falling into the errors of the Manicheans, (which admitted two principles, of good and evil;) and that it was even necessary for salvation to believe, that *every human creature is, and ought to be subject to the Pontiff of Rome.*

The effect of this remarkable and precise Decretal, the Abbe Fleury has endeavoured to dissipate, by observing that nothing in fact was *decreed*, subversive of the temporal authority of Sovereigns. He confesses that all the preamble tends to assert that doctrine; but the things resolved upon, he imagines to be merely the position, that every human creature ought to be subject to the holy father; which no one can deny, says the Abbe, *provided it is confined to spirituals.* (x)

His criticism does not appear convincing, since it is the very *proviso* which is contested. The preamble must always be compared with the decree, in order to explain its meaning; and if we do this, whatever might be the real law that was received in the world, nothing perhaps can be more succinct or fixed than the meaning of the Court of Rome upon the subject.

As a proof of it, Boniface, in consequence of the decree, appeared armed with full powers, and issued another Bull, by which he declares that all **KINGS, EMPERORS,** and other Sovereign Princes, whoever they may be, are subject, like all other men, to be summoned before the Apostolic Courts, for every sort of cause; for such, says he, is our will, “ *we who, by the permission of God, command the whole Universe!*”

Bold and unreasonable as these claims were; ridiculous even as they now seem; imperfect, and illegi-

(x) Histoire Eccles. 19. 37.



timate, as the Council might appear which pronounced them; it is curious to observe their effect upon the kingdom against which they are directed. One would have thought, that the very impudence of the pretension would have been sufficient to have defeated itself; and that the French Monarch might have let it pass off without notice, as the ebullition of folly or madness. Not so: he was reduced actually to defend himself, not so much by *resisting* the claim, as by attacking the *person* of the claimant; and was forced, instead of meeting, and deciding the question upon the spot, to appeal to the same Tribunal, only composed of other Judges.

In a second meeting, therefore, of his States, he loaded the Pontiff with the most virulent abuse; he accused him of every sort of crime and heresy; of being an infidel, a forcerer, a confuter of dæmons, a Simonack, a murderer, and a sodomite; of having said he would rather be a dog than a Frenchman, and would ruin the whole of Christendom, or destroy the French pride.

By this artful conduct, he moved his people to request him to procure the convocation of a General Council; to which, and to a future Pope, he might refer the matters between them; and, affecting to acquiesce, he prepared a formal act of *Appeal*.

In the procuration of this, he intreated the Bishops to join him, and protesting against the authority of the last Council, and of the person who called himself Pope, he declared he would only abide by the decision of the new Tribunal. The Clergy consented to the appeal, but added, in express terms, that they would not make themselves parties against BONIFACE. They promised, however, to support the King in the contest against whatever violence he might undertake; a promise which, it is remarkable, Philip was forced to require, by swearing *on his soul*, in conjunction with the Queen, and his children, to protect

protect them, in return, from a vengeance which, according to the received law of the Church, they knew would be legitimate.

Exclusive of the assistance of the Clergy, the King thought he could not be entirely secure without the support of the rest of his kingdom; he therefore promised his protection, in the same solemn manner, to the nobility, and all those in general who should give their consent to the convocation of a future council, and he sent commissioners all through the realm to receive this consent from provinces, cities, universities, and chapters. These were precautions which it is wonderful so powerful a Monarch should have been forced to take against such chimerical pretensions, had he not been sensible that the superstition of the times might probably bear out his enemy in his unreasonable enterprise. Upon the whole view of this affair, we are indeed often obliged to observe, that the conduct of Philip, at the moment when he seemed most sensible of his rights, and most determined to support them, is the greatest proof of the Pontiff's power. Had the point of dispute been incontestible, or had he not been much afraid of the religious veneration of men for the See of Rome, even in its most extravagant undertakings, there would have been no occasion for him thus to have armed himself. Above all, his endeavours to *depose* the Pope, and his appeal to a future Council, instead of resisting their authority upon points which he contended were so clear in his favour, are strong proofs, afforded by himself, of the influence we are noticing.

The rest of this remarkable affair is equally unsatisfactory in determining the point. BONIFACE, true to his design, assembled a Consistory in which he purged himself, by oath, of the crimes laid to his charge; he persisted in his resolution to punish the King, notwithstanding what he called his *frivolous*

*lotus* appeal; he declared that no Council could be assembled without his own consent, in which he was right, according to the received usage; and lastly, that there was no one on earth greater than himself, nor even his equal; in which, according to the corrupted sense of religion then extant, he was not far wrong.

He went on, in different Bulls, to say, that, as Vicar of Christ, he had the privilege of governing Kings with a rod of iron, and could bruise them like a potter's vessel; but that, as a good father, he meant only to give them salutary correction; he therefore for the present, excommunicated Philip; absolved all his subjects from their allegiance to him; threatened them with curses if they obeyed him; declared him incapable of command; *annulled all Treaties which he might have made with other Princes*; bade him return to the yoke of his legitimate obedience, and trust entirely to the mercy of his Lord, if he wished to avoid a punishment still more severe; by which he meant the only one that remained, a regular and formal deposition.

The maxims of the world were too little settled to suffer Philip to be at rest under this danger. The old Law of nations had gone such lengths with respect to the papal authority that he knew not where it might stop; and the firm activity of Boniface made him tremble for the event of an affair which he had been so long unable to settle. The danger indeed had now become instantaneous; for Boniface had offered the kingdom of this rebellious son of the Church to the Emperor Albert, who himself had but just quitted rebellion, and who probably was only withheld from accepting the offer, by weakness. Philip therefore resolved upon an action, which no Monarch in Europe, since the foundation of the papal power, had ever dared to attempt. He detached COLONNA and NOGARET, (the former an  
Italian

Italian of power, and the declared enemy of Boniface,) to surprise that Pontiff in *Aganie*, the place of his nativity, whither he had retired; and they executed their measures so well, that they overcame his guards, carried fire and sword into his palace, seized upon his treasures, and treated him with an indignity amounting to brutal. (y)

Nothing, however, could overcome the spirit of this extraordinary man; he resolved not to convoke any new Council; he persisted in his claims of temporal supremacy over the world; and he absolutely refused to renounce the papacy which was demanded of him. "You may kill me," said he several times, stretching forth his neck, "for I am in your power; but if I must die, I will at least die Pope."

The event of the affair rather got rid of, than decided it. Boniface, rescued by his countrymen, died, as it was said, of grief and mortification; and his successor, Bennet, though devoted to France, and represented by the historians as a just Prelate, thought it right to give absolution to Philip, and to condemn the faithful Nogaret to banishment in Palestine, which was meanly suffered by his master. He also deemed it necessary to take off, in form, the censures which had been laid upon the realm, before it could return to its pristine soundness among the States of Europe. (z) Such was the end of this remarkable dispute, which was founded solely upon the power already universally attributed to the See of Rome by the LAW OF NATIONS; a power, as we have seen, almost raised, or at least formed into

(y) Colonna went so far as to strike him on the face; he was placed upon a colt, without saddle or bridle, and mounted with his face towards the tail.

(z) For the account of this contest between Boniface and Philip, see Fleury. Hist. Eccles. F. 19. Walsingham. ad an. 1303. Velly 4. 82. et infr.

a system,



a system, by the political abilities of GREGORY VII.

It was under that daring Pontiff also, that Europe became acquainted with another and a very powerful effect of religious deference for the Vicar of Christ, in the privilege assumed by the Court of Rome, to be the sole disposer of earthly kingdoms. An epistle of his still extant, of the date of 1073, to the Nobles of Spain; in which he asserts his claim to the whole of that kingdom *as the patrimony of St. Peter*; observing, that although the greater part of it was in the possession of the Moors, yet it had formerly been under the dominion of the Christians, and therefore of the Apostle; "that what once had belonged to him, must still belong to him; and he therefore grants to the Count de la Roche, all that he can conquer from the Saracens in that country." (a) He carried his pretensions so far, as to extend this claim to the States already possessed by Christian Princes in the kingdom; all of whom he required to acknowledge themselves his feudatories, to quit the gothic liturgy, and to receive that of the Romish Church. They replied, however, with becoming spirit, that they were independent Sovereigns, who owned no superior on earth; and for this time the designs of the See of Rome were defeated in Spain. (b)—In the year 1300 a similar claim is laid to the whole kingdom of *Scotland*, at that time lying open to various pretenders, a letter of BONIFACE to EDWARD I. of England, stating, that Scotland had belonged to the Church, "pleno jure, et ab antiquis temporibus." (c)

The transactions preliminary to the conquest of *Ireland*, under HENRY II. furnishes us not only with

(a) Epist. ad princip. Hisp. Baronius. 1073.

(b) Mod. Un. Hist. 16. 218.

(c) Labeo Concil. ap. Du Mont. 1. 224.

a strong example of this received power, but of another effect, and that a most pernicious one, which the corruptions thus introduced into the Church establishments had upon the law of nations. According to all maxims of justice and regularity, the inhabitants of every country have an absolute right to the dominion of the soil, unless they themselves have surrendered, or forfeited it, by some act of their own; nor can the profession of this or that set of customs, or of this or that religion, give any title to their neighbours to invade them, so long as they have furnished them with no other cause. The abuse of Christianity, however, and the usurpations we have been treating of, operated upon, and effectually changed this part of the law. HENRY II. wanting a pretext to subjugate a territory so convenient by geographical position for his own States, gravely asks leave of the holy Father to make a conquest of Ireland, in order, as he says, “*to extirpate the vices of the inhabitants, and bring them into the way of truth.*” “*Rogavit Papam Adrianum, ut sibi liceret Hyberniam Insulam, hostiliter intrare, et terram subjugare, atque homines illos bestiales, ad fidem, et viam reducere veritatis, exterpatibus ibi plantariis vitiorum.*” (d) The answer of the Pope is a full grant of his request, and upon the same principles. He tells him, that he is about to lay up for himself an eternal reward in Heaven, for extending the bounds of the Christian Church; that there cannot be a doubt but that *Ireland*, and all the Islands which have received the light of Christ (who is the Sun of justice,) must belong to the jurisdiction of SAINT PETER, and he therefore grants him the permission he demands, upon the stipulation however, of the usual tribute to the Apostle, of a penny a year for every Christian family. (e)

(d) Mat. Par. 95.

(e) Mat. Par. 95. & Rymer's Fæd. i. 15.

About the same time, the Venetians having sided with the Pontiff against the Emperor FREDERICK BARBAROSSA, and gained the naval battle of *Lignano*; the Pope, to preserve the memory of it, sent a present of a ring to the Doge, commanding him to throw it into the sea, which out of his apostolic power, he thus gave him to wife; and hence arose the well known annual ceremony of the marriage of the Doge of that State with the Adriatic. (f).

The right assumed by the Christian nations, of reducing to their obedience, *for the sake of converting them*, all people who professed a faith different from their own, continued for a great length of time in Europe. It is still a received doctrine among those who submit to the establishment of the Inquisition, and thus the mild tenets of Christianity, which seek for proselytes through the sober means of conviction, were made to assume all the fierceness, and absurdity of Mahometanism, which decides upon belief by the scymiter.

The tyranny and injustice of the Spaniards towards the American nations, were defended upon this ground; and every investigator of the affairs of Europe has been struck with those remarkable *grants* made by the Holy See to Portugal and Spain, of all the countries they should discover, the one to the East, the other to the West.

Both grants were considered as valid by the law of the times, and the former was gravely reasoned upon as such, by the Ambassadors of Portugal to Edward IV. at the close of the fifteenth century. Some English merchants, having endeavoured to open a trade with the coast of Guinea, Ambassadors were sent to the Court of London, to state the right to that country conferred by the Father of Christendom, upon the Portuguese, and EDWARD, upon such

(f) Hen. Hist. Chron. I. 196.



authority, not daring to continue his enterprize, instantly ordered his merchants to desist. (g)

The grant to Spain gave rise to proceedings, and to reasoning, so extravagant, that I cannot help setting them before the reader, though at the expence of extending this account already but too long.

Ten years after the discovery of the main land of America by COLUMBUS, attempts were made to settle it. Two governments were marked out by Ferdinand for two adventurers, who consulted the most eminent Lawyers and Divines in Spain, upon the manner of taking possession. By these wise men it was determined, that as soon as they arrived, they should require the natives *to subscribe to the articles of the Christian faith, and the supreme jurisdiction of the Pope over all the earth*, which if they did not do, they were to be reduced to slavery by fire and sword. In consequence of this, OJEDA (one of the adventurers) on his arrival, published a proclamation, by which he notified to the inhabitants, that he was the servant of the kings of Leon and Castile, the conquerors of *barbarous nations*; that God had created Heaven and Earth, and one man and one woman, of whom all are descended; but as their posterity were scattered about in various kingdoms, God had given them in charge to one man, named SAINT PETER, whom he had constituted, *Lord of the whole race, and commanded to reside at Rome as the most proper place for the government of the world*. That he was the judge of all Christians, Moors, Jews, Gentiles, and all sects whatsoever; that he was called the POPE, which signifies ADMIRABLE, GREAT FATHER, and GUARDIAN; that this power, and this appellation, had been transmitted to his successors; that one of them had made a grant of the Islands, the Terra Firma, and the Ocean, to his Sovereigns

(g) Hackluyt's Voyages, v. 2. 2d pt. p. 2.



Ferdinand and Isabella, in deeds *which the Inhabitants might see if they pleased*; that thus they had already become Lords of the Islands, and the people he then addressed, were bound to obey them in the same manner; which if they did not do, he would take them wherever he could find them, *and treat them as rebellious subjects. (h).*

Other States, if they did not follow the Spaniards in the extremes of cruelty, at least proceeded in the discoveries they made in the new World, upon the same principles. In the patent granted by Henry VII. to John Cabot and his Sons, to discover and take possession of new lands; the position is reasoned upon, as if its soundness was beyond a possibility of doubt. Henry grants to these celebrated Navigators, full power and authority to sail to all parts of the world, and “ to seek out and discover all  
“ Islands, Countries, Regions, and Provinces whatsoever, *that may belong to Heathens and Infidels.*  
“ He grants to them, their Heirs, and Assigns, and  
“ to every of them, licence to set up his banners and  
“ ensigns in every Village, Town, Castle, Isle, or  
“ Mainland, of them thus newly found; and authorises them to *subdue, occupy, and possess*, as his  
“ *vassals and lieutenants*, all such Villages, Towns,  
“ Castles, Isles, and Mainland, so found; procuring to him the dominion, title, and jurisdiction of  
“ the same.” (i) In like manner a patent was granted by ELIZABETH to the celebrated Sir Humphrey Gilbert, authorizing him “ to discover, find, search  
“ out, and view such remote, *heathen and barbarous*  
“ lands, countries and territories, *not actually possessed of any Christian prince or people*; and he, his  
“ heirs, and assigns, are to have, hold, occupy, and  
“ enjoy the same, with all their commodities, ju-

(h) Robertson's Hist. of Amer. 1. 235, 236, & note 33.

(i) Hackluyt, 1. 510.

“ jurisdictions,

“ridictions, and royalties.” (*k*)—A similar grant was made in the succeeding reign to Harcourt and North, of the whole river of Amazons, provided it was not in the possession of *Christian* people; (*l*) and in the instructions to Fenton by the Lords of the Council in 1582, he was enjoined not to spoil or take any thing from *Christians*, without paying for it, upon pain of punishment; the Infidels in these points seemed left to themselves. (*m*) Who among us but would be filled with indignation were a fleet of ships from some part of the Globe, hitherto unknown, (if such there be) to arrive in Europe on discoveries, and pretend to spoil us of our goods, or take possession of our territories upon the authority of similar patents? Such however was the law, upon which our ancestors proceeded, at the close of the fifteenth century.

But the fullest example of the Pope’s authority to dispose of all earthly Crowns, is to be found in the course of the revolutions of Sicily and Naples. From the eighth to the eleventh century, that country had been a prey to the power of the Saracens, when some Norman gentlemen, under the conduct chiefly of the famous ROBERT GUISCARD, and his brother ROGER, undertook to dispossess them, which, with much valour, they effected. But tho’ the Conquerors availed themselves of their power, and exercised the rights of Sovereignty, both in Sicily and Apulia; their possession was not supposed to be confirmed, until they had received a regular grant of it from the Pope, which they accordingly obtained from NICHOLAS II. about the year 1059. (*n*) It is to this grant that the supreme Sovereignty of the

(*k*) Hackluyt, 3. 135.

(*l*) Harris’s Voyage, p. 1. 715. Rymer, 17. 215.

(*m*) Hackluyt, 3. 755.

(*n*) Fazell De Reb. Sic. L. 6. 389.

See of Rome over Naples and Sicily, exercised from that time to this day, and the most important matters that afterwards occurred in the histories of those countries, are in fact to be ascribed. (o) In 1130, ROGER, then only duke of SICILY, procured the erection of the duchy into a kingdom, from this all powerful Sovereign. In 1198, after many contests between different competitors, the Empress CONSTANCE, the heiress of the last family, was put in possession of it upon swearing to do homage when required. In 1207, Innocent III. married the young king Frederick to CONSTANCE of Arragon, and promised the whole realm to the family of Arragon, in case Frederick died before consummation. Upon the election of Frederick to the Empire, he forced him to agree to abdicate Sicily, in favour of his eldest son, in order to prevent the junction of the two Crowns. Upon his deposition in the council of Lyons, 1245, Innocent IV. reserved, as we have seen, the disposal of it to his absolute will; and after the death of Frederick it was annexed for ever, together with Naples, to the dominion of the Holy See in 1254. In the mean time however, Mainfroy, who had been declared Regent; trusting to his influence with the people, assumed the regal power; and it became a point of honour not to acquiesce under the pretensions of a man, who was supposed to arrogate to himself the just right of his master. In support therefore of this right, Innocent resolved to give the crown to any prince who would undertake to dispossess Mainfroy. He offered it to various potentates, and first turned his eyes on Charles Count of Anjou, brother of Saint Louis, whom he invited

(o) The philosopher of modern times must smile when in the preamble to the Treaty which took place in confirmation of this grant, he observes the haughty GUISCARD styling himself, "I ROBERT, by the grace of God and *Saint Peter*; duke of Apulia, &c. &c."

to take possession of it in 1252; but the absence of his brother in the East, prevented that ambitious prince from accepting the offer at that period. (p) He next fixed upon Richard Earl of Cornwall, brother of Henry III. who also rejected it. But though the presumptive heir of the crown thus bandied about, was his own nephew, his rejection was not founded upon any respect, either for his rights, or those of nations; but merely upon the difficulty of the enterprise he was required to undertake. His third attempt was with Henry himself, to whom he offered it for his second son, prince Edmund, and by him it was accepted. Innocent dying during the transaction, his successor, Alexander IV. proceeded in it with equal zeal, and sent a ring to the prince by the Bishop of Bologna, as a mark of investiture, the ceremony of which was solemnly performed before the Court in England, “Unde,” says Mat. Paris, “elevatum est cor Regis, in sublime, et exultavit tanquam, jam receptis Siculorum et Apulorum, omnium homagiis, civitatibus, et castris, in regem coronaretur. Et in propatulo, rex pater vocavit filium suum Edmondum, regem Siciliæ.” (q) So legitimate, in the eyes of the kings of that time, had a false spirit of Christianity rendered the claims of the supposed Vicar of its Founder.

The designs of Henry however were defeated through inability. In want of every thing necessary to make a conquest, he found he had engaged in an undertaking far above his force; and unsupported by his parliament, who set their faces against the enterprise, he offered to renounce the precious gift which the Holy Father had made him, but strange to tell, his renunciation was absolutely refused. Alexander insisted upon the execution of his engagement, and

(p) Burigny, 2. 133.

(q) Mat. Par. 911.



even threatened *him* also with excommunication, in case of failure. In this suspended state the affair stood for some time, when URBAN, who had succeeded Alexander, finding his hopes from England baffled, turned himself once more to France, where he invited Lewis IX. to the assistance of the Church. and proposed to bestow this remarkable throne upon one of his younger children. Lewis, the most just prince of his time, hesitated at first as to the legality of the transaction, not being able to manage between two difficulties; since he was not fully convinced of the legitimate deposition of Frederick, and therefore considered his grandson CONRADDIN as the rightful king; or, if this could be got over, he was bound to respect the claims which the investiture and the treaties of Edmund of England, had given him. In these objections however, no opposition seems to have been made to the power claimed by Councils of deposing princes, but merely to the *regularity* of that of Lyons; and it is remarkable that the delicate monarch, though he declined the offers himself, permitted his brother the Count of Anjou at last to accept them; and after some discussion with the Pope, upon the authority of the Council of Lyons, actually furnished him with powerful supplies, in the prosecution of the enterprize. The claims of prince Edmund had been soon got over, in consequence of his non-compliance with the conditions into which he had entered; and a papal letter to England, set forth in form, the power of the Pontiff to transfer the rights he had given to Edmund, to another, more able, and more willing, to perform the duty required of him. (r) The event of the affair is well known,

(r) Rym. i. 769. Many parts of this curious letter describe at length the effects which the Supreme Pontiff expected to have seen in *England*, upon the injuries done to the Church. "Expectat enim, expectavit diutius, quod sublime regni Angliæ solium

known, Charles was the conqueror of all his rivals, and the crown of Naples, in consequence of this gift of the Pope, continued in his family for three centuries.

The contest for Naples and Sicily, extended its effects beyond the bounds of Italy, where it was chiefly carried on, and furnished the court of Rome with another opportunity of exercising the privileges we speak of. In the wars of France and Arragon, towards the end of the thirteenth century, we again behold how the law of the European nation had been influenced by the papal usurpations. Peter, king of Arragon, had sided with the Suabian family against the Count of Anjou, and wrested from him the crown of Sicily. For this, and the difficulties which in consequence he threw in the way of the Pontiff's designs, it was resolved to proceed with him as with Mainfroy. Accordingly he was excommunicated, his subjects, as usual, absolved; and not only Sicily, but his own kingdom of Arragon, declared forfeited to the Church, that is, to such person as could conquer it under the rights which the Church pretended to bestow.

This person was again sought for in France, and Philip III. *though not at open war with Peter*, accepted the offer for Charles, his second son. The Convention was solemn and public; a variety of conditions were set forth in detail at a full Parliament held at Paris; the Cardinal Cholet, preached a Crusade against the Arragonians; a number of persons assumed the cross; and prince Charles was declared in form, king of Arragon and Valentia, and Count of Barcelona. (s)

“folium, cum strenua domus gentis Anglicanæ potentia, quam  
 “dictus PRÆDECESSOR in ipsius regni collatione specialiter ho-  
 “noraverat, apprehenderet arma et scutum, et exurgeret in adju-  
 “torium matris suæ,” &c. &c.

(s) Rym. ad an. 1283, 1284. Burign. 2. 204. Velly, 3. 403.

This offer and acceptance, gave occasion to a vigorous invasion of Arragon; the Emperor of Constantinople, Michael Paleologus, withdrew from the Spanish alliance in consequence of the excommunication; (*t*) and if the family of Arragon preserved their dominion, it was owing solely to their success in the war, not from any scruples that were entertained by any prince in Europe, upon the legitimacy of the cause. Even as it was, the malediction of the Pope was considered of so much effect, that James king of Arragon, the successor of Peter, was obliged in the end to make a cession of Sicily, in order to preserve the rest of his territories; (*u*) and by the second article of Treaty of Terascona, which finally settled the peace between the parties, the king of Naples agreed to use all his efforts to engage Charles of Valois to renounce the rights which the Pope had given him over the crown of Arragon. Such, and so great was the force of these donations, unparalleled in the history of any country but Europe, and of any period of time but of that before us.

The course of this war also beheld another privilege claimed and constantly exercised by the Pope; namely, that of being the sole casuist among men. We have seen that oaths, which are an invocation of the Deity, coming under the spiritual jurisdiction, were peculiarly subject to the papal influence; and it was sufficient that an oath should be construed to be contrary to the interests of the Holy See, to make it null and void *ab initio*. In consequence of this, when Charles, the successor of the Count of Provence, in the kingdom of Naples, had been liberated from the prison which had been his lot during the Sicilian war; the Pope released him

(*t*) Burigny, 2. 205.

(*u*) Id. 2. 224, 225.

from the observance of many of the conditions which were the price of his deliverance, *expressly* because they were contrary to the interests of St. Peter, and it would therefore have been impiety to perform them. (v)

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We have hitherto considered the States of Europe, under the various relations in which they stood with respect to one another, and the laws which governed *their* intercourse alone, as separated by religion from the rest of the world. It is in this place however that we must also consider them, as united in a body with respect to the other quarters of the globe, and give a sketch of their manners towards nations professing a religion different from their own.

The true spirit of CHRISTIANITY, to which we have approached much nearer than our ancestors, has in the present times inclined us to observe the humane customs which we practise ourselves, towards all other nations, whether Pagans, Infidels, or Idolaters. But in the period before us, the false zeal of Christianity, or rather of a corrupted Church, induced the Western States to consider all those of a different persuasion from themselves, as a race of inferior beings, devoted to wickedness, whom it was therefore meritorious to *invade*, and with whom it was infamous to treat.

The *Jewish* and *Mahometan* people, felt the force of these prejudices in a manner which excites our indignation at its injustice, and our pity at its cruelty. As the former composed no regular State,

(v) Velly, 4. 26. 'The invasion of Holstein by the king of Denmark in 1225 was owing to a similar absolution by Pope Honorius III. (Pfeffel. Dr. Pub. D'Allem. 1. 378.)

but



but were merely tolerated up and down the world, it may at first appear irrelevant to take notice of them in a treatise, whose subject is the general law of States. But though widely separated among the communities of the earth, they were all of them closely connected as one integral nation; and though they were destitute of all that forms the essence of a body politic, (as the right of dominion, of making war, Alliances, Treaties, or Conventions;) still the characteristic marks of difference which divided them from *all* other people, and the treatment which, in consequence, they endured, from *all* the Christian nations, obliges us to take notice of the conduct observed towards them, as one of the laws of Europe.

The hatred with which these people were regarded, arose evidently from the sufferings which the Founder of CHRISTIANITY had been made to endure from them; and which was thought to justify the numerous persecutions they so often underwent. So far back as the time of JUSTINIAN, it was forbidden by the Eleventh Canon of the Trullan Council, for either the Clergy or Laity, to eat any of the unleavened bread of the Jews; to enter into any familiarity with them, to receive assistance, or medicines from them in illness, or to use the same bath with them. (w) From that time forth, their persecutions through every country in Europe, are conspicuous, though the particulars of them, it would take up too much time to record at large. It is sufficient to say that they were considered as the fair objects of pillage wherever they settled: They paid immense sums for the privilege of remaining

(w) Howel. Synops. Can. et Concil. Œcumen. 34. The Trullan Council was so called from its being held in the Trullum, a hall in the palace of Constantinople, which was vaulted; Trullum signifying a Dome, from Trulla a cup. Gloss. de Du Cange.

under the common protection of the laws: They were farmed out to particular men for extortion: (x) In Germany they were considered as Serfs belonging to the domain of the Emperors: (xx) In England they were also "holden as it were in " a common servitude," and this, according to Sir Thomas Smith, expressly because they had refused to acknowledge the Messiah: (y) In consequence of which also in EDWARD the First's time, the *good* Christians were not to take above *half* their substance. (z) By the laws of the Wisigoths their testimony was forbidden to be received in a court of Justice; (a) and under other constitutions they were spoken of as beasts in the language of the law, their persons and effects being adjudged to belong to the Lords of the manors, wherever they were *levant and couchant*. (b)

Upon the crimes of individuals among them, at one time in France, the whole body were banished, after being plundered of all they had, or put to death by the most cruel torments; and even while under no accusation, a commerce with their women, was ranked in the same class of crimes with a commerce with brutes, and inhibited on pain of being burned alive. (c)

We

(x) HENRY III. of England sold them *for a certain number of years*, to his brother the Earl of Cornwall, in order, says Mat. Paris (902) that the Earl might tear out the entrails of those, whom the king had only *skinned*. In another place (831) he says, he raised money from them, "non tandum abrasendo, " vel excoriando, sed eviscerando," &c.

(xx) Pfeffel D. Pub. d'Allem. i. 193. 246, 400.

(y) Commonwealth of Eng. 139.

(z) Statut. de Judaïsme. S. 2.

(a) L. L. Wisigoth. L. 12. Tit. 2. Art. 10. Lindenbrog. 224.

(b) Velly, 2, 336.

(c) C'est, que *souiller* avec une Juive, est un crime égal à celui qui se commet avec les betes. Velly, 2. 338. So also the Speculum

We have had several other examples in the course of the present chapter, of a severity which was supposed to be legitimate, from all *Christian* to all *Infidel* nations. They would however be incomplete, were we to quit the subject, without taking notice of the celebrated **CRUSADES**.

I shall not fatigue the reader with any account of their rise ; of the industry and enthusiasm of the hermit Peter, or St. Bernard ; the eloquence of the Popes ; or the fervour of Monarchs ; far less shall I attempt to enter regularly into their history. These are all too well known to need repetition, and I shall therefore merely point out their influence with respect to the law immediately before us.

That influence appears in its most striking form, in producing at once, *a new and perpetual cause for war*, against the enemies of the Christian name, and for peace among its friends. To invade the Turks and Saracens, was not only permitted, but inculcated as a duty, although there was no *particular* grievance to be complained of ; and such an invasion was always esteemed not only a reason for making peace with the party who embraced the cross, but subjected the person who began hostilities with him, to the severest censures of the Church, and the authorised attacks of his fellow Christians.

Why it should be thought more acceptable to God, to offer up our prayers to him in one place, rather than another ; or why it should be an indis-

Speculum Suevicum, Cap. 317. Si Christianus cum Judæa, aut Judæus cum Christiana rem habet, debet unius corpus corpori alterius imponi, et ita utrumque flammis consumi. For many other particulars which describe the lot of the Jews during these times. See Plessel. 1. 193, 246, 490. LL. Wisigoth. 12, 2, 3. M. Par. 431, 489, 641, 827, 831, 856. Henault, 1. 198. Velly, 4. 310, 332, 334. Villaret, 1. 239, 485. 6. 112, 118, 323. They would form a work not unimportant to the history of manners in Europe ; but though not irrelevant, it would lengthen this account too much to introduce it.

penfable duty with feveral millions of men in one quarter of the globe, to march to the attack of feveral millions in another quarter, for the poffeffion of a certain Sepulchre and Crofs, (however venerable they might be rendered by him of whose fufferings they were the memorials;) it will be difficult to explain upon any folid, or philosophical principles. Such however was the opinion of our Anceftors. It entered into all their operation, influenced the whole caft of their minds; and to make war upon Infidels, as has been obferved, was a very conspicuous part of their Law of Nations.

In no country did this difcover itfelf with greater force than in *Spain*, for it was not to the Eaft, that it was folely confined. The whole of this fertile peninsula exhibits for a long time, but one great divifion of the ftates which compofed it into Chriftians and Saracens, or Moors. Their wars were perpetual during the whole of the period before us; the ground was difputed inch by inch; and the CRUSADE, with all the well known advantages of remiffion of fins to thofe who undertook it, might almoft be faid to be a ftanding one. In confequence of this the *Chriftian* nations there planted, received not unfrequently, a powerful aid from their brethren in other parts of Europe; and in 1148, they faw a numerous fleet of *Germans*, *Flemings*, and *Englifh*, fail up the Tagus to affift the new king of *Portugal* in the conqueft of Lifbon. The change of his capital from *Conimbro* to that City, was the fruit of it. (d) It was in Spain alfo that the celebrated founder of the DOUGLASSES perifhed in the courfe, as he thought, of his duty, (e) after having juft exe-

(d) Henault, 1. 191. Mod. Un. Hift. 18. 184, 191.

(e) Buchanan, L. 8. c. 58. Nihil intereffe ratus, quo in loco, rem Chriftianam fervaret, fe cum Hispanis conjungit, &c.



cuted the last and pious command of his friend and Sovereign, itself a strong indication of the spirit we are commemorating. (f)

The most eminent examples however of that spirit are afforded by the Monarchs of *Germany*, and *France*, in the citations which they sent to the Sovereigns of *Saracenic* name. In the summons of the Emperor FREDERICK to SALADIN, previous to the second Crusade, he speaks to him as follows; "Since you have lately chosen to profane the Holy Land, which, under the king of Heaven, belongs to us; we think it part of our care and duty, to punish such presumptuous and criminal audacity; and therefore, unless you restore the whole of your conquests, and make satisfaction for the injuries done to the Christian Church, within the space of a year, we mean to prove the fortune of our arms with you *in virtue of the wonderful Cross, and of the true Joseph.*" (g) The answer of SALADIN, was couched in terms of dignity and good sense. He claimed, he said, the dominions he possessed, by rights, acknowledged by the customs of the world; nor could he conceive how the circumstance of their religion could give the Christians any title to them; he observed that the Saracen Host, was fully equal, and even superior, to the Christian; that princes, equally powerful, and equally remote, could arm in defence of their name and religion; that so far from fearing the extermination with which he was threatened, he would gladly go to meet the Emperor, at the head of all his power; yet, as he had no objection to peace, so little did he conceive Religion to be a cause for perpetual enmity, that if the Christians would give up the only three

(f) ROBERT BRUCE had undertaken a Crusade, but being too old to perform his vow, he requested Douglas to carry his heart to Jerusalem, and bury it there.

(g) Mat. Par. 164.

cities

cities left them among the Saracens, *Tyre, Antioch, and Tripoli*, he would restore to them their Cross, deliver up his captives, permit a priest to reside at the temple, and shew favour to their pilgrims. (*h*)

The preliminaries to the Crusade, undertaken by St. Lewis sixty years afterwards were conducted pretty much in the same manner. The king, on his arrival in Egypt, summoned the Soldan to render that homage to the Cross, which was due to it, he said, *from all the world*. In case of refusal, he bade him prepare for absolute destruction from the hands of men who feared nothing *while extending the Empire of Christ*. The Soldan, who was at that time nearly consumed by a mortification of the body, which soon after caused his death, is said to have shed tears at this injustice. He replied however with spirit, that no one had ever attacked Ægypt with impunity, and that those who thus *wantonly* invaded him, would soon be made to feel the temerity of their enterprises. (*i*)

The whole Christian race might have profited by these answers of the Mussulmen they affected to despise. They were however only the more inclined to those bloody invasions, in which the kings of Europe and of Asia, distinguished themselves so much for the most dazzling valour, and the most horrid cruelties, at the same time.

As the difference of the religions produced a particular cause for war, unknown to either set of nations among themselves; so also when war was begun, it was the reason why it was conducted with a bar-

(*h*) Mat. Par. 164. It is curious to observe how the practice of both the religions had wandered from the principle. The Mahometan, who was ordered by his Prophet to disseminate his by fire and sword, was preaching peace: The Christian, who, if he had acted up to his Saviour's doctrine, should have molested no one, breathed nothing but war.

(*i*) Joinville. Vie de St. L. 1249.

barity peculiar to itself. “ In the name of the God “ you worship,” said SALADIN, to the prince of ANTIOCH his prisoner, worn down and emaciated with hunger, and chains; “ what would he command “ you to do with me, if I were in your power, as “ you are in mine?” “ He would counsel me,” returned the fearless prince, “ to have you beheaded “ on the spot; but as you are a *Sovereign*, like myself, though an Infidel; I myself ought to be your “ executioner.” “ Your own mouth has pronounced your doom,” said the Saracen, drawing forth his sword, and the prince who had thus courted his fate, is said to have kneeled down joyfully to receive the blow. The last words also which he uttered, evinced the firmness of his enthusiasm: “ Here dog,” said he, “ take this head of mine, which is rough, “ and squalid, with hair, and famine; little good “ can it do thee, and nothing more canst thou now “ have; my soul I commend to my God.” (k) In reading the records of such actions, we know not whether our admiration is most commanded by the splendour of mind which they discover? or our regret excited, at the prejudices and barbarity which obscured them.

To these prejudices must be attributed the fate of the brave and pious *Pieul de Ragonet*, who was sawed in halves, two centuries afterwards, by another Sultan of Syria, for daring to blame the *Mahometan* faith, and refusing to renounce his own (l). To these must also be attributed an action on the part of RICHARD I. the bare recital of which, fills us with horror. In 1191, upon the taking of Ptolemais, the Saracen prisoners were to be delivered up by capitulation, for a certain ransom to be paid at different periods. Some distrust being evinced by SALADIN

(k) Mat. Par. 813.

(l) Chron. de Monstrelet. v. 2. an. 1425.



in the course of the affair, RICHARD, who here but little deserved his surname, ordered out five thousand captives at once, who were led, bound, and naked, into a large plain; in which defenceless state, they were all deliberately massacred, by those very soldiers, whose honourable gallantry in open battle, has so often been the theme for poetry and praise. (m) That the vengeance might be still more complete, the bodies of these unfortunate victims were instantly cut open, their galls torn out for the purposes of medicine; and so great was the ignorance and blindness with respect to Mahometans, that much gold and silver were supposed to be found in their inside. (n) In the midst of this cruelty, however, the interests of his religion, though he mistook them, were so far consulted by Richard, that those Mussulmen who consented to be baptized were allowed their lives. (o) It is not incurious to observe the conduct of the same men, in other matters, during this remarkable affair. When the Cross, the sacred object of their perilous warfare, was delivered to them by SALADIN, they bowed down in silence before it; they prostrated themselves in humble adoration, and covered their heads with the dust; and when *Ptolemais* itself was delivered to them, their first care was to purify the Mosques, which the infamous worship of *Mahometans*, it was supposed, had defiled. (p) On the other side, the Saracens were not behind them in zeal; and when *Jerusalem* was recovered by Saladin, the Temple, which the Christians in their turn were supposed to have defiled, was purified

(m) Iter. Ric. Hieros. C. 4. ap. Gale et Hovedon. 697.

(n) Iter. Ric. Hierosol. C. 4. ap. Gale et Hovedon. 698. It is the latter that asserts "Quos omnes evisceraverunt, et aurum et argentum multum invenerunt in visceribus eorum, et fœc eorum usui medicinali servaverunt."

(o) Hovedon. 696.

(p) Vie de Salad. par Marin. 2. 299. 305.



with equal care, and washed with rose water, in order to efface the stains of their impious worship. (g)

It has been observed that their Religion itself prescribed the death of *Christians* as a duty to the followers of MAHOMET, and Saladin knew well how to take his advantage of this. The war he waged therefore against the Europeans, was considered, not only as a defensive, but a sacred war, equally supposed to spring from the commands of God; and the *Imans*, imitating the arts of the Christian priests, like them, promised to their soldiers the remission of sins, and the palm of martyrdom. (s) The opposing armies therefore every where met with the most inflamed and exterminating hatred; the Mussulmen took the title of *Unitarians*; and the Christians, in conformity with the mystery of their worship, were called *Trinitarians*. (t)

In the infancy indeed of Mahometanism, all the enemies of that religion were put to death without mercy. But after its establishment, whenever the Mahometans declared war against a people of a different faith, they gave them their choice either to embrace their religion; or to submit and pay tribute; or take the consequences of battle. In the first case they were incorporated among the Mussulmen: in the second, they were allowed to profess their own tenets, provided they were not idolatrous: in the last, if they were conquered, the women and children were reduced to slavery, and the men, if they persisted in rejecting the faith, were either slain, or disposed of at the pleasure of the prince. (u)

(g) Aqua rosea tamquam a Christianis sordibus expians sacri legis ritibus, &c.

Chron. Walt. Hem. C. 34. ap. Gale.

(s) Mod. Un. Hist. i. 248.

(t) Marin. 2. 184, 185.

(u) Mod. Un. Hist. i. 248.

In pursuance of this spirit, when Chatillon, a famous Crusader of those times, was taken prisoner by SALADIN, he was reproached, amongst other things, with blasphemy against *Mahomet*, and sacrilege, for having attacked the holy cities of *Mecca* and *Medina*; notwithstanding which, his life was offered him, if he would renounce his religion. This being refused, "It is time," said the Sultan, "to punish such accumulated crimes; I have sworn that thou shalt die by my hand, and I will now fulfil my oath." Upon this he immediately seized him; and dragging him into the midst of the assembly, condescended, for the second time, to become the executioner of a *Christian* Sovereign. (x)

It is really wonderful to consider, how long this remarkable rage for destroying a whole class of nations, on account of their religion, continued amongst us. *Jerusalem* once conquered, it became, according to the Church, the duty of every Christian to defend it; although, politically, no wise concerned in its fate. A resolution to make war upon the *Turks*, was the chief expiation for the greatest crimes: it was the principal condition of the peace between the Emperor Frederick, and Gregory IX. the instrument of pardon to our Henry II. for the murder of Becket; (y) and the means of cure, as it was supposed, to Lewis IX. in a dangerous sickness. (z) To such also as had distinguished themselves this way, a crown was supposed to be a fair reward; and this sort of merit forms the ground of the erection of Sicily into a kingdom, in favour of Roger III. He is styled in the grant, "*Inimicorum Christiani nominis, Intrepidus Extirpator*;" for which, and the great services of his ancestor, *Robert Guiscard*, in the same

(x) Marin. 2. 22.

(y) Lyttelt. 3. 97.

(z) Joinville.

cause, he was received by the Pope among the crowned heads of Europe, in 1139. (a)

In the thirteenth century, this spirit displayed itself in a manner which gave rise to an expedition that was new to the world. Little improved by the experience of the past, not only men, but *children* resolved upon the deliverance of the sacred Cross. Fifty thousand of the latter, composed of either sex, set forth for Asia, from Germany and France, led on by priests, who themselves knew no better than the army they commanded. The event was such as may be supposed; the whole of the expedition failed, and mostly before it could reach the destined theatre of operations. Many of them were attacked by the *Lombards*, and fell an easy prey; many of them suffered shipwreck; and not a few were sold to slavery, by the very merchants with whom they had contracted for their passage. "What, says a judicious historian, "are we to think of the parents of these deluded creatures, for not preventing so extravagant an enterprise; or what, of those governments which could suffer the best hopes of the State to run thus blindly to their destruction?" (b)

A hundred years afterwards, the same spirit discovered itself in *France*, in a manner not very dissimilar from the last, in the projected Crusade of the fanatics, called, from their original occupations, the *Pastoureux*. Though these expeditions had for some time been laid aside, the king, PHILIP V. was seized with the sacred fury; and, in the year 1317, we find him gravely asserting, *that Christ had left the Holy Land as an inheritance to his followers.* (c) Being, however, persuaded from his purpose of a Crusade, on account of the weak state of Christendom, a num-

(a) Collect. reg. Concil. 98.

(b) Velly. 2. 458.

(c) Adjourn. par Philippe V. contre Rob. Comt. de Fland. Leibnitz. Cod. Dip. 95.

ber of shepherds and country labourers conceived the chimerical idea that it was reserved for them to be the deliverers of the holy land. They therefore abandoned their flocks, and, imagining that what God had designed, he would bring about in his own way, they thought it unnecessary to supply themselves with other arms than the pilgrim's scrip, or other provisions than what they obtained by begging. The zeal of the people where they passed, amply supplied this latter want; their numbers encreased; women abandoned their families to join them; and the king himself was supposed to favour their undertaking. Falling, however, into disorders, under some designing leaders, they degenerated into robbers, (as more regular Crusaders had often done before) and were suppressed at last by the civil magistrate. (d) From that time, the vigour and genius of these expeditions seem to have been worn out in the world; and though many were planned, yet none of any consequence were afterwards undertaken. The law upon the subject, however, still remained the same; and the mere circumstance of religion, or the recovery of *Jerusalem*, was a sufficient cause for war against the Infidels. One Sovereign State remained, and remains to this day, the professed object of whose institution, is to wage perpetual war with them; an object which the knights of *Malta* have always pursued with great gallantry and perseverance. Occasionally also, through most of the centuries afterwards, we find this antient spirit breaking forth. JOHN II. of France, famous for his bravery, his honour, and misfortunes, planned a Crusade upon his return from captivity, and, in 1362, went for that purpose to Avignon, where, under the auspices of the Pope, he conferred upon the matter with Peter de Lusignan king of Cyprus, and Walde-

(d) Velly. 4. 329.



mar III. king of Denmark, two monarchs, the proximity of whose territories at least, could have had no part in the concert with which they acted. These three princes resolved upon the invasion of the East, as usual, for the deliverance of the Christians from the Saracen tyranny; and, as usual, nothing arose from it but the severer persecution of those sufferers in whose cause they had armed. (e) There were two reasons, however, says the historian, which inclined the king of France to the undertaking; one, in order to fulfil the vow of his father, PHILIP of VALLOIS; the other, to disgorge his kingdom of the famous banditti, known by the name of the Companies. (f) This last is of the same kind with that which inclined many sovereigns to undertake the Crusades at first; so that, in this respect, the Law of Nations became subservient to the law of politics; and whenever the warlike spirit of the people proved dangerous to the sovereign, the received customs of the times pointed out a *legal banishment* for them into Palestine.

The lapse of a century did not wear out these manners. The intentions of our HENRY IV. previous to his death, are well known; and in 1458 PIUS II. endeavoured to revive the true spirit of the Holy War. - He invited all the princes of *Christendom* to a general assembly at *Mantua*, to deliberate upon the invasion of the East. Europe, however, was little able to defend herself; and the Turk had by that time fixed his standard firmly within her precincts, by the total destruction of the empire of *Constantinople*; exclusive of which, the whole body of her kings were in arms against one another. They nevertheless sent their ambassadors to the Assembly, and as no one had yet thought of calling in question the extravagance and injustice of these causes for

(e) Froissart. v. 1.

(f) Id. Ib.

war, it was their weakness alone which prevented the expedition. (g) In 1475, CHARLES the BOLD laments that the perjuries and attempts of LEWIS XI. prevented his design of turning his arms against the Turks. (h) In 1480, LEWIS himself, whether through policy, or real zeal, pretends to the same design; nor can we forget, while on the subject, the pious humility of a lady, hardly less than sovereign in England, in the person of Margaret Countess of Richmond, the mother of Henry VII. who is said to be in the habit of observing, that upon condition that the peers of *Christendom* would combine themselves against the common enemy, the *Turks*, she would most willingly attend them, and be their laundress in the camp. (i)

At the close of the fifteenth century, the ardent, but ill-directed spirit of Charles VIII. brooded perpetually upon these chimerical expeditions, which from his youth had flattered his imagination; he even purchased, at a large price, the rights of Andrew Paleologus, the heir of the Christian emperors to the throne of *Constantinople*; (k) and the authors in general agree, that his adventurous invasion of *Naples* was made as the first step towards the conquest of the East. (l)

The continued successes of the Turks, however, changed, by degrees, this part of the European law of nations; and the monarchs of Christendom found, at last, not only the vanity of these enterprises, but the folly of their cause. The holy sepulchre was so far removed from them, by the extension of the Ottoman dominion, almost into proper Germany, that they lost sight of that famous point of contention;

(g) Hist. Ecclesiast. Villaret. 4. 338.

(h) Garibea, Hist. de Fr. 1. 333.

(i) Camden's Remains. 271.

(k) Vide infra. chap. xv.

(l) Guicciard. 2d. an. 1492.

and began to consider the Infidels merely as a political power. Still, however, the marked distinction created by religion, remained at least as far as the time of Grotius; that father of the Law of Nations having handed the position to posterity, that to defend a Christian state against the attacks of Infidels, is yet the duty of every Christian community. (*m*)

I cannot quit the point of the Crusades, and by that means close the subject of this chapter, without calling to the reader's recollection, that although they took their rise from hatred to Infidels, and the wish to recover Jerusalem, yet they were by no means confined to the Infidels in the East, or to Infidels alone. All Pagans, whether in Asia or in Europe, were attacked by those who assumed the cross. The conversion of *Prussia* was finally effected by it under the Teutonic Knights; (*n*) and even a slight shade of difference from the received topics of Christianity, or rather from the liturgy of Rome, became, at last, a legitimate cause for war.

This was the only thing wanting to the ambition of the Popes; and, under their able hands, it was turned into a very powerful engine, by which to crush all sorts of heresies; all princes who shewed a disposition to disobey him; and, in fine, all the enemies of Rome, under whatsoever shape they assumed. These, it was supposed, were equally hateful to Christ, with the Pagans and Turks; and when the holy Father thought them of consequence enough to combat them by means more terrible even than excommunication; he detached his Legates all through *Christendom*, to excite its various princes to arms, in the same manner as when he meditated the invasion of the East. Those who obeyed also, were supposed to be equally meritorious with the

(*m*) De Jur. B. et P. 2. 15. 12.

(*n*) Puffend. Introd. à l'Hist. T. 5.

others ; they were equally soldiers of Christ ; they wore the same badge of the cross ; and they were alike entitled to the remission of sins.

In this manner it was that the See of Rome became so terrible to a vast number of princes who attempted to set it at defiance : To the immense sect of the *Albigenses*, and the puissant Count of *Tholouse* in the beginning of the thirteenth century ; (o) to Frederic II. (p) whose disposition in the Council of Lyons we have related at large ; to his son CONRAD in 1251, the invasion of whom was to confer even greater spiritual advantages than a pilgrimage to the Holy Land ; (q) to MAINFROY, when vows against the Saracens were commuted for an attack upon the Sicilian ; (r) and finally, to all who did not acknowledge the election of Pope Urban, in 1383, when a Crusade was preached in England, (s) and Spencer, Bishop of Norwich, its Generalissimo, achieved, in consequence, the conquest of Maritime Flanders. (t)

Such, upon the whole, are the chief points of influence upon the Law of Nations in Europe, which, as far as I have been able to discover, arose, during these ages, from the profession of CHRISTIANITY. They form an immense mass of materials, which it has been somewhat difficult to arrange ; and I have therefore often incurred the danger of repetition, and certainly of prolixity, in their elucidation. The view, however, which was taken of

(o) For an able summary of the historians on the heresy of the *Albigenses*, and their consequent destruction by a Crusade, see Velly. 2. 203 to 222.

(p) Mat. Par. 767.

(q) Statuens retributionem mirabilem, scilicet omnium peccatorum remissionem ampliore quam pro peregrinatione in terram sanctam facienda. M. Par. 827.

(r) Hist. de Sicile. 2. 123. 148.

(s) Rymer. 4. an. 1383.

(t) Froiss. v. 2. chs. 132, 133, 134, &c.



the subject, demanded exactness, and above all, what are called Proofs and Illustrations. Those which have been adduced, I have thought sufficient to support the points of the theory ; and were they not so, materials are afforded in such plenty, by the history of every country in Europe, that I have always been more embarrassed in determining what to reject, than in selecting what to record. It must be confessed, that the matters which have here been presented, are a proof that Christianity, *in its corruptions*, was often, during these times, as injurious to the law in question, as it certainly has been beneficial *in its purity*. It must be recollected, however, that the very point is the intimate connection *which all religion whatsoever*, whether corrupted or pure, whether true or false, will ever have with the laws, public as well as municipal, of all the nations that profess it ; and I have therefore been obliged to pursue it, in the religion before us, through all its effects, however adverse, or however favourable.

## C H A P. XIV.

## OF THE INFLUENCE OF CHIVALRY.

A Very interesting theme presents itself now to our enquiries, in the institutions of CHIVALRY; which have often before been the subject of criticism, but, as usual, more by way definition, and description, than to point out their effect upon the laws of the world. It was the lot of these ages, upon principles not unnatural, to be witness to the greatest inconsistencies at the same time; for at the same time, the most horrid and barbarous injustice, and the most heroic and disinterested acts of generosity, are for ever arresting our attention. The little progress which the *European* people had made in morality, the savage manners of those they sprang from, and the laxity of the various governments, gave loose, as we have seen, to the indulgence of every sort of passion. Above all, the universal independence of the Barons, under the feudal system, took away all restraint from those who were at once strong and willing enough to invade the peace of mankind. A man of brutal manners, and narrowness of soul, who dwelt within the walls of a fortress, whence he could sallie forth at pleasure to the annoyance of his neighbours, and which afforded him a retreat from superior force, or a secure deposit for his plunder, had every temptation to play the tyrant and the robber. Sovereigns and magistrates had long attempted in vain to repress these mischiefs; religion, as we have seen, had interfered, but with

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doubtful

doubtful success; and, in this emergency, the world turned itself to every means it could invent for the promotion of its improvement. It fell upon one, which, in such rude times, it must be owned, was an extraordinary, but perhaps the most effectual mode of restraining what had so long baffled more regular attempts.

There is probably nothing more curious to philosophical investigation, than that disposition of men, which has often been evinced, to place all their interests and ambition either in acquiring, or in abstaining from, some one particular thing the possession, or the loss of which, does not seem, in the abstract, to be worth so much pains as are bestowed upon it. When this is the case, it generally goes by the name of the *POINT OF HONOUR*; and though it shall be sometimes an object to which we are not personally or naturally called, yet whenever it is once established, the whole bent of our minds, and the force of our virtue, are collected into it, as into a focus. Indeed the history of humanity has often made us observe, that whenever, through the superior temptation to do ill, an absolute excess of degeneracy, or mere accident, the world has been plunged into extraordinary difficulties, it has generally betaken itself to as extraordinary means for its recovery. Hence the opposite virtues and vices are commonly found to be coeval; the extremes of good and evil are discoverable in the same period; and it is only when things pursue a regular and tranquil course, that a wise moderation can exist.

The miserable state of society during these ages, and the atrocities that were daily committed, produced a *Point of Honour* such as we have been noticing. Men saw the necessity for reformation; the common modes had been tried in vain; and it was necessary to kindle *enthusiasm*, to effect a cure. By working therefore, though in a different way, upon  
the

the same warlike passions which caused the mischief, and raising the fervour of the mind, through every motive of religious devotion, and every worldly prejudice; Europe at length raised within itself a spirit the very opposite to that of which it complained. Accordingly, if men were found, on the one hand, who gave way perpetually to their avarice, revenge, ambition, or lust; there were numbers, on the other, who placed their *point of honour* not only in abstaining personally from these, but in opposing and exterminating all those who did not.

It was hence that the laws of CHIVALRY arose; which have so often excited our interest in the numerous legends, and our admiration in the bold flights of poetry to which they gave birth.

I shall leave the regular account of the particulars of this remarkable Institution to those who have made it the immediate subject of many a learned and pleasing disquisition; (a) and, as usual, supposing them well known, shall merely examine them as they arise, according as they appeared to have influence on the law of nations. Such influence, as may be supposed, (considering the military spirit of the institution) may be traced in more direct and regular steps than any other; and, indeed, as long as it lasted, it will be found to have been the cause of considerable improvements in the mode of carrying on war.

Exclusive of courage equal to heroic; of patience under hardship; of perseverance in the achievement of the most adventurous undertakings; which all tended to the advantage of the knight himself; it is well known, that he was expected to be accomplished in all the gentler and more hu-

(a) See Dissertations de Du Cange sur Joinville. Du Tillet Recueil des Rois de Fr. Mem. sur la Chevalerie par M. de Sainte Palaye. Favine Theatre d'Honneur. & Dissert. Hist. sur la Cheval. par Honoré de St. Marie.



many virtues of honour, courtesy, fidelity to his word, and kindness to the vanquished; qualities, which tended to the advantage of all other men. In the practice of these, he was educated with care from the age of seven; he passed through the different gradations of Page and Esquire, (this last again divided into various degrees) before he could attain to the summit of his dignity. Nor was the last honour conferred, till he had employed many hours in devotion, in which he fervently craved the assistance of the Deity, to fulfil the generous objects of his profession.

The court and castle of every sovereign and greater baron in Europe, was filled with the best hopes of its youth, who were thus preparing themselves for the great tasks they had undertaken; a custom, besides, which enlarged the means of education, and supplied the want of power, or want of attention in parents to points so necessary for the improvement of the world. Hence, when the knight, thus formed, sallied forth to support his part among men, the education he had received naturally taught them to expect a greater exertion of duty from him than from others; and any failure in these points was therefore more severely punished. (b) These circumstances alone, it should seem, ensured the production and support of a vast body of the military all over the world; whose duty was to soften the horrors, as well as to shine amidst the dangers, of war.

The smallest attention to the annals of the ages we treat of, will point out innumerable proofs of this; and whatever savageness of temper a man might naturally have possessed, the POINT OF HO-

(b) Villaret I. 300.

NOUR, and spirit of knighthood, had the most palpable and beneficial influence in generating a continual antidote to its consequences. So early as the middle of the tenth century, when the Emperor HENRY I. introduced tournaments into Germany, (which it is well known were the fairest graces of *Chivalry*) it was ordained that no one should be admitted to that most honourable of all amusements who did not profess *Christianity*; or who had been known to have been guilty of perjury, treason, *slaughter in cool blood*, sacrilege, or violation of women. (c) Certain it is, that from about this and the next century (to which the full birth of Chivalry is generally ascribed) we are able, notwithstanding the barbarities that have been related, to discover, nearly all over Europe, a change of manners which was evidently forced, because other improvements did not keep pace with them; and which may fairly be attributed to a chivalrous origin. In a romance, called the WINGS, near five hundred years old, and quoted by M. de Sainte Palaye, (d) the author allegorically supposes the valour of CHIVALRY to be borne up by two wings; without which, he says, it can never take a lofty or extensive flight. One of them is called *Liberality*; the other *Courtesy*. Of this latter, he observes, it arises from Chivalry; as from a fountain; that it comes from God; and that the knights, over whom it flows from head to foot, are its exclusive possessors; they have the *fee simple* of all that it waters; the rest of the world have nothing but the outside.

To justify this allegory, we find a variety of cases all through Christendom; many of which we shall have occasion to avert to in the discussion of other points. The annals of our own country are full of

(c) Heiss. i. 54.

(d) Mem. sur la Cheval. i. 72.

them ; nor can we help remarking the sudden progress of mankind to generosity, from savageness and ignorance, in the conduct of William Rufus towards many of his enemies, and of the earl of Gloucester towards the captive Stephen. The former of these princes, in his politics and general character, possessed all the barbarity of the times. As a knight, however, he was equal to the most courteous. Being overthrown in a combat at the siege of Mount St. Michael, and only escaping by making himself known, he demanded sternly the name of him who had caused this disgrace, and the soldier not fearing to declare it, “ by Luke’s face,” “ said the king, “ thou shalt be my knight, and be “ enrolled in my checke with a fee answerable to thy worth.” (e) At another time, having taken one of the enemy’s generals prisoner, and rather deriding him for want of skill, the general answered, that if he was once again at liberty, the king should find he was not a man to be laughed at : upon which, “ well liking the confidence of his spirit,” says Speed, he replied, “ Well then I give thee full liberty ; go thy ways ; do what in thee lieth ; I am the man that ever will mate thee.” (f)

The fatal battle of Lincoln having reduced Stephen king of England to captivity, under the power of the earl of Gloucester, that accomplished nobleman, though the struggle had been for no less than a crown, which in former times would have instantly decided the fate of a rival when prisoner, treated him with the greatest humanity, forbade all persons to reproach or insult him, paid him the respect due to his dignity and royal blood, and kept him in safe but *gentle* confinement. (g) STEPHEN himself had also shewn a great example of courtesy and good

(e) Speed, 439.

(f) Id. 440.

(g) Lyttelt. i. 207.

faith, under the strongest temptations, when he suffered the Empress MATILDA, whom he might have taken in Arundel castle, to pass in safety to Bristol, giving her the earl of Millent as an escort and protector, an office, adds William of Malmesbury, which no true knight could ever decline, *even towards his greatest enemy.* (h)

The same good principles which dictated to a knight the humane treatment of a vanquished enemy, forbade him still more to attack one that was unarmed. In older times, *all* ranks of men had been confounded in one indiscriminate massacre, or reduced to a servitude that was general; but it was beneath a knight to attack mere labourers of the soil, or mechanics who could do no mischief; and such were the representations of Beaumanoir, a Breton, to Richard Bembrow, an English officer, in 1350, who was ravaging the country. He told him that so valiant a knight ought not act so contrary to the *laws of war*, and that if he really wished to deserve his title, he would attack men *only who had arms in their hands.* (i) These representations produced a challenge, and ended in the celebrated combat of Thirty, related with much exactness by the historian of Bretagne; in which thirty French, and thirty English knights, fought till the latter were all killed or disabled.

The most beautiful examples, however, of the courtesy to enemies which was produced by CHIVALRY, are to be found in the actions of EDWARD III. and of his gallant son, who were the delight and flower of knighthood; particularly in the conduct of the former to Ribbemont, a French nobleman whom he had overthrown in combat; and of

(h) Will. of Malms. 2. 184. *Quem cuilibet, quamvis infestissimo inimico negare, laudabilium militum mos non est.*

(i) See D'Argentrée's Hist. of Bretagne, an. 1350.



the latter towards John king of France, after the battle of Poitiers: both of them are too well known to need repetition here. (*k*) The whole life almost of the Black Prince, was passed in acts of bravery or courtesy. None are more characteristic than that which gave liberty to the celebrated BERTRAND DU GUESCELIN, the most renowned knight of his time. This general being made prisoner at the battle of Navaret, which restored Peter the Cruel to the throne of Castile, was confined in the castle of Bordeaux, where the council of the prince not unwisely determined to detain him. Generosity of soul, however, and a jealousy which sprang from the very spirit of CHIVALRY, undid in a moment what policy had deliberately determined. Albert, an officer of the prince's, coming to him one day, asked him if he would be offended if he informed him of a report that was spread concerning him: Edward telling him that he would even consider it as a mark of his affection, Albert replied, "It is said of your highness, that you refuse to ransom BERTRAND DU GUESCELIN, as you have done your other prisoners, because you are jealous of his valour, and are even afraid of him." I afraid of him! returned the prince, with emotion, "I am afraid of no one on earth;" and immediately ordered him to be admitted to ransom. (*l*) The settlement of this ransom also will give us a very good picture of the manners of the times. BERTRAND begged the prince to consider that he was a poor knight, who had nothing but what he had gained in the war; and the prince therefore told him to name the sum himself. "If I must do so,"

(*k*) Froiss. v. 1. chs. 151, 152, 168. See also the treatment of Sir Adam Gordon, by Ed. I. who had personally engaged him. M. Par. 1002.

(*l*) The story is told at much length, and with great simplicity, in Froissart. v. 1. ch. 224. Vie de Bert. du Guesc. p. 137. says

says this accomplished gentleman, " I will at least name something worthy a man who has had the honour to command the king's armies;" and he named 100,000 gold florins. Edward refused so large a sum; upon which Bertrand fixed upon seventy thousand, and added *he would not abate a farthing*. This was agreed upon; liberty was given to the Frenchman to go where he would, in search of the money, *upon his parole*; and so great was the esteem for him even among his enemies, that CHANDOS, the most redoubtable of them, offered him his purse on this occasion, and the princess of Wales herself made him a present of 30,000 florins towards the sum. (m) Nothing can be a greater proof of the improvement of manners, and the influence of *Chivalry*, than the whole affair.

The Lord Chandos, above-mentioned, was the most accomplished of the English knights; and tho' more than once a determined enemy of Bertrand in the field, yet on other occasions he had treated him with remarkable courtesy. On his combat with THOMAS OF CANTERBURY, formerly mentioned, (n) he offered him his own arms, and the best of his horses, for the battle, though against one of his own party, which were thankfully accepted; (o) and at the battle of Auray, (in the quarrel for Brittany) when Bertrand was surrounded by the English soldiers, he broke through the press, and commanded them to save his life. (p) When this general was himself mortally wounded, some years afterwards, his brother having ordered the deaths of all his prisoners, in revenge, he prevented the execution, saying they had but done their duty, and that his death

(m) Id. 15.

(n) Chap. IX.

(o) Vie de Bert. du Guesc. 33.

(p) Id. 79.

ought not to prevent him from doing justice to their valour (q)

In this last battle also it was the courtesy of CHIVALRY which saved the life of *Carlouet*, the French commander. There was among the English, says the author, a knight, who having been formerly the prisoner of *Carlouet*, was rated at so high a ransom, that he was totally ruined, and ever after regarded him with mortal hatred. In the heat of action, *Carlouet* fell into the hands of five or six soldiers, who were going to put him to death; but the knight, breaking through them, rescued him from their hands, and called out to him, "I have too much honour, in the condition to which you are reduced, to remember the ill treatment I experienced from you; I might, without shame, revenge myself, by taking away your life; but I give it you; and though I make you prisoner in my turn, I promise you more kindness and easier terms than I was made to feel when in your possession. (r)" Such traits of nobleness make us forget all the extravagances with which the Institution that gave them birth was certainly obscured.

The French, as it may be supposed, were not behind-hand in courtesy; and a circumstance in the fourteenth century, though trivial in itself, is particularly demonstrative of the change which manners had undergone. Although the kings of France and England were such constant, and often such personal enemies, it had been the custom for the former, to make a present to the latter, of the best wines of France for his table. In 1369, CHARLES V. thought it right to continue this custom, *notwithstanding a rupture between the crowns.* (s) In 1475, at the conferences of Picquigny, though EDWARD IV. was in

(q) Id. 201.

(r) Id. Ib.

(s) Villaret I. 393.

arms at the moment against LEWIS XI. he was supplied in his camp with every thing he wanted, from the king's household, even to torches and candles. (t) A more serious mark of confidence and generosity had been shewn by PHILIP V. to EDWARD II. in 1319, when in the safe conduct granted to the latter to come into France, all those whom it concerned were commanded to believe him, and let him pass as king of England, *upon his bare affirmation*. (v) In the next century, the TALBOTS, and the XANTRAILLES, of the time, in some measure revived the courtesy of Chivalry, which the hatred of perpetual war had almost extinguished. Talbot was taken at the battle of Patai by Xantrailles, who presenting him to the king, demanded leave to give him liberty without ransom, which was granted. In the course of that eventful war, Talbot had a full opportunity of returning this courtesy, by becoming in his turn the conqueror and the liberator of Xantrailles. (w)

The effect of this courtesy of knighthood upon men's conduct in war, is also exemplified by the rules observed in fixing the quantum of ransom. MONTLUC, a famous knight about the middle of the sixteenth century, when the true spirit of Chivalry had been revived in the world, observes in his commentaries, that he was always *moderate* in this point towards his prisoners. "Cela est indigne, says he, de les escorcher jusqu' aux os quand ce sont personnes d'honneur qui portent les armes. (x)"

A man, writing in these times, cannot but advert to the sad change which the manners and maxims of war of this once generous people have almost in a moment undergone. Some future investigator of our

(t) Phil. de Commynes. L. 4. Ch. 6.

(v) Et lui dix Roys d'Angleterre soit de tous ce creux, par sa simple assertion. Rym. 3. 825.

(w) Villaret 3. 416.

(x) Montluc ap St. Palaye. 1. 364.



subject will possibly in other centuries have it to remark, that at the close of the eighteenth century, when the Convention of France had boasted that it had got the start of the rest of Europe by 2000 years in refinement and knowledge, it passed a decree by which every English and Hanoverian prisoner should be put to death. The most horrid of the barbarities related in the first section of the ninth chapter, are thus made to revive, and to be the proofs of 2000 years superior progress in improvement. The future philosopher will also have to observe upon the generous and dignified return that was made to that decree, and the manner in which the return was received; and if any thing will make him suppose that the wicked folly and injustice which governed the intercourse of the Christians and Infidels, such as we have seen it, is renovated, it will be the reasoning of the representatives of this superior people, who gravely assert that humanity may be observed between the soldiers of tyrants; but that republicans and tyrants being as opposite as vice and virtue, no mercy should be shewn between *them*. A difference in form of government, is thus made to generate, what a difference in points of faith had formerly produced; and all the horrors of the Crusades are to be revived, because the French chuse one constitution, and the English another. In what is here remarked, there is neither occasion, nor would it be relevant to enter into any particulars of the quarrel, or any personal reasoning concerning the character of individuals. The observation might be made by a dispassionate stranger, five thousand years hence, if letters should last so long.

Courtesy, however, was by no means the only effect which Chivalry produced upon the laws of the time. Among the foremost of them is to be mentioned that fidelity to their words, on which all who had taken the oaths of knighthood, peculiarly piqued themselves.

themselves. A failure in this point entailed eternal infamy upon their memory, and drove them with ignominy from the order; and so great was their respect for an oath, a promise, or a vow, that when they lay under any of these restrictions, they appeared every where with little chains attached to their arms or habits, to shew all the world that they were *slaves* to their words: nor were they taken off till their promise had been performed, which sometimes extended to a term of four or five years. (y)

We here then behold a palpable means of improvement to the Law of Nations, which depends so much, and almost so entirely, upon good faith, there being no tribunal with any power of coercion. Its effect in enforcing the observance of *Treaties*, was indeed visible; and in the oaths which continued for a long time to be taken by crowned heads in the way of guaranty or ratification, to swear *by his word, and as a true knight*, was a common custom. (z)

The well-known sentiment of John king of France need scarcely be repeated, that if honour and good faith were driven from all the rest of the world, they ought to find an asylum in the mouth and in the heart of princes. JOHN was one of the most famous knights of his time; and when his son, the Duke of Anjou, had broke his parole, and retired from the court of Edward III. he thought it incumbent on him, by way of excuse, to put himself once more in the power of that king, and accordingly made a second voyage to London, where he died. (a)

Nor was the bare fear in a knight to break his word, the only reason which men had to expect the performance of it.

(y) Sainte Palaye i. 236, 237.

(z) Le duc de Bretagne jura l'observance du dit Traité par la foy de son corps, *et comme loyal Chevalier*, &c. Id. i. 135.

(a) Villaret, i. 288. et infr. It does not appear, however, that he became a *captive*, but merely went to excuse the fault of his son. Rapin. 4. 310. et infr.

The most severe and the most infamous punishments were decreed by CHIVALRY against those knights who had sullied the honour of its Institutions. Any one judicially convicted of this, not only underwent the common chastisement for his offences, whatever it was, but his ignominious banishment from the order he had disgraced, was rendered as solemn and public as human ceremonies could make it. He was placed upon a scaffold amid a number of spectators; his arms were taken from him, broken to pieces, and trodden under foot: the blazonry of his shield was effaced; and it was dragged, *reversed*, at the tail of a horse, through the mud. It must be observed, that to reverse the shield of a knight, was the common ceremony to denote his death; and this part of the act of degradation was therefore to shew, that when he was dishonoured by a breach of his word, by cowardice, or any other infamy, he was considered as *dead to knighthood*; as a *carcase*, to use M. Sainte Palaye's expression, devoid of sentiment.

Kings, and heralds, assisted at this ceremony. Priests, after having chaunted the service of the dead over them, recited the 108th psalm, which contains imprecations and maledictions against Traitors. Three several times the King, or the Herald, demanded the name of the man whom they were thus dishonouring. A *Poursuivant* pronounced it aloud; and the Herald answered that it was no longer the name of him before their eyes, since he had quitted it to become a Traitor, and a breaker of his word. (*Deloyal et foi mentie.*) After this, he took from the *Poursuivant*, a bason of hot water, which he poured upon the head of the dishonoured knight, to efface the sacred character which had been conferred upon him; and the latter was finally lowered down from the scaffold by cords, was placed upon a bier covered with a winding sheet, and conducted to the church, where the funeral service was again solemnly

ly performed over his body. It was hardly possible for human invention to have imagined a ceremony more terrible, or more capable of shaking a mind, in which there was left alive the least spark of sentiment or feeling. (b)

When such was the punishment of a breach of honour in almost all those who acted any eminent part in the affairs of the world, we may readily conceive how much it was calculated to produce improvement in its general manners, particularly in the laws of war; and such public infamy, being more especially designed for men who were *false* and *perjured*, the dread of incurring that reputation became a real security for the contrary.

An Instrument dated 1364, preserved by Du Tillet, where he gives an account of the Knights of the Orders, purports to be "an obligation made by Messire Jehan de Gressi, Captal of Buche, prisoner of war to king Charles V. *to keep the prison agreed upon, on pain of being considered as a false, bad, and disloyal knight; a perjured promise breaker; as a mark of which, his arms were to be reversed, and he himself pursued through all the courts of justice.*" (c) In the same spirit Rene duke of Lorrain, making a league against France in 1486, agrees expressly in his treaty, that if he fails in his engagements he will be content to see his arms *reversed* and dragged at a horse's tail. (d)

It is not at all improbable that the custom of giving liberty upon parole (a very considerable advance) arose entirely out of Chivalry. Courtesy and good faith being so great a part of the duty of a knight, they induced him on one side to grant liberty to a prisoner upon promise either not to serve against him till

(b) Vide the whole ceremony in St. Palaye 1. 316. et infr.

(c) Du Tillet. Recueil des Rois des Fr. 318.

(d) Garnier. Hist. de Fr. 2. 245.



he had ransomed himself, or to return to his prison when called upon; and on the other hand, when he himself was taken, they procured the most scrupulous adherence to whatever engagements he made.

Of this there are a vast variety of examples; some of them not incurious, and all of them demonstrative of amended manners. **WALERLAND**, Count of Saint Pol, of the imperial house of **Luxembourg**, being taken by the English, all ransom was refused for him; nevertheless he was allowed liberty on his word not to escape, and formed one of all the parties at the Court of **EDWARD III.** where he married **Matilda Courteney**, a princess of the blood, who at length obtained his liberty. (e) **Thomas Percy**, an English knight, taken in the same war by the French, was allowed liberty to go in search of his ransom, and took an oath between the hands of four other knights that he would be bound to return, and *fight with them all four at once*, if he did not fulfil his promise. (f) We have seen the liberty given by the Prince of Wales to **Du GUESCELIN** for the same purpose, and that illustrious General had often himself shewn a like courtesy to his prisoners, (trusting to the known honour of Chivalry,) particularly in the case of **Trouffel**; to whom he accorded, in compliance with a custom which seems to have been general, (g) the space of a year, in which to procure his ransom or return to prison. (h)

During this interval, no one of course could carry arms against the party whose prisoner he was; and even though hostages were taken for his appearance, the law remained the same. **Charles of Blois**, in 1351, when allowed his parole to seek his ransom, left his sons in England as hostages for his return, "*Sans toute fois*," says an old author, "*qu'il se pût*

(e) Froiss. v. 2.

(f) Id. Ib.

(g) See Chap. IX.

(h) Vie de du Guesc. 28, 29.

“ *armer avant que d’avoir payé le prix dont on estoit convenu.*” (i) In the war however of Castile, in which the Black Prince engaged only as *Auxiliary*, I find a circumstance which forms a kind of *case* in the annals of war. The Marshal d’Andreghem had been taken by that Prince, and liberated on his parole till he paid his ransom. His captor being at peace with all the world, the Marshal entered into the service of Henry the new king of Castile, and was once more taken by Edward at the famous battle of Navaret. The Prince reproached him with breach of his word, for bearing arms against him before he had discharged his ransom, which he said was contrary to all the rules and laws of honour, and gave him a right to put him to death. The Marshal replied that he had not broken his word, since he had taken arms only against *Don Pedro* the enemy of Henry, and not against him, the Prince of Wales. The matter was referred to the judgment of twelve knights, who after having taken cognizance of the affair, acquitted d’Andreghem. (k) It is not here the place to examine whether this conduct of the Marshal was strictly according to the rules of war, as practised in the present day; I mention it merely to shew the growing regularity of the times. An ancient Vandal, would not have been able to comprehend the dispute, and would have prevented its necessity by the instant death of his prisoner. Upon this subject of *parole* however there was another very remarkable point, which was sometimes pleaded, but I believe never regularly settled. This was the absolute liberty claimed by the enlarged prisoner if his captor happened to die before his ransom was paid. I find it in the instance of the Comte de Richemont, who being taken by Henry V. and libe-

(i) Vie de du Guesc. 14.

(k) Vie de du Guesc. 132.

rated on his *parole* to return to prison when called upon, is said to have pleaded that the death of that Monarch released him from his parole, and accordingly refused to return. (l)

In Italy a refinement not unfamiliar, was practised in the year 1514, in the case of Gian Pagolo; who having negotiated an exchange between himself and a Spanish General, Bernadin Carvagiale, obtained leave to go to Rome upon his *parole* to return if the exchange did not take place. Carvagiale died before the exchange, and Pagola affirmed that he was liberated from his promise upon that event. (m) Both these cases however appear unsupported by others, and are certainly not law according to the present practice.

This reliance upon each other's word, from respect to the honourable Order to which they all belonged in common, produced another advantage to the profession of arms, which evinces still farther the growing confidence of men. As in the heat of battle there might be much danger of a prisoner's being rescued; impediments were thrown in the way of giving liberty on *parole*, and might not unfrequently lead to the necessary death of the vanquished. To remedy this, the soldiers of the time in giving their faith added a regular article or condition, of *Rescued or not Rescued*; (*recoux ou non recoux*,) by which every difficulty was obviated, and the vanquished was to remain a captive at all events.

We have several examples of this in Froissart. At the battle of Poitiers, *Thomas Vercler*, an English Knight, being taken by a French Esquire, the latter whose party were defeated, justly feared the loss of his prey, whom he might therefore have destroyed on the spot. *Vercler*, however, gave him his

(l) D'Argentrée Hist. de Bretagne 1422.

(m) Guicciard. ad. an. 1514.

word that *recoux ou non recoux il demuroit son prisonnier.* (n) In the following case, still more remarkable, we see even the capture of the captor, and yet so strong an adherence to the promise given, that the obligation remained to him though in prison. The whole affair is so characteristic, that it is possibly worthy being mentioned somewhat at length, and in the simplicity of Froissart's own language.

The armies of Scotland and England being in each other's neighbourhood, the knights on either side made short excursions. In one of these, James Lindefey, a Scottish Knight, met with Matthew Redeman, an English one, and a fierce battle ensued, in which the former had the advantage. Redeman, says Froissart, called out, "Messire Lindefey je me rends a vous. Voire dit le Chevalier, (d'Escoce) *recoux ou non recoux.* Je le veuil dit Redeman, *vous me ferez bonne compagnie.*" The terms were agreed upon, and Redeman continued—"Quelle chose voulez vous que je face? Votre prisonnier je suis, vous m'avez conquis. Et quelle chose voulez vous que je vous face, respondit Messire Jacques. Je retourneroye volontiers, dit Messire Matthiew, a Neufchastel, et dedans quinze jours, je me retrairay vers vous en Escoce, la, ou il vous plaira m'assigner journee. Je le vueil, dit Lindefey; *vous ferez par votre foy dedans, trois semaines en la ville de Haindebourg. (Edinburgh.)* Tout ce luy covenanta et jura Messire Matthiew Redeman."

(o) After this agreement the Knights separated, the one to Newcastle, the other to continue his excursion; but presently Lindefey falling in with the bishop of Durham's troops, was himself made prisoner and conducted to Newcastle, where he found Redeman, who acknowledged himself still his prisoner,

(n) Froiss. v. i. ch. 163.

(o) Froiss. v. 3 ch. 228.



and they agreed to be exchanged one against the other. (p)

I fear to multiply examples, but the following, in the same author, is also too pointed to be passed over. The Duke of Gueldres being on his way into Prussia through Germany, was set upon in the road, and himself, with all his attendants, taken prisoners. The whole gave their faith to the different persons who took them, and the Duke to a simple Esquire called *Arurant*. (q) The Grand Master of Prussia hearing of this disaster, resolved to rescue the prisoners, and set out with a large company for the city where they were confined. The captor of the Duke being thus threatened, and fearing lest he should not be able to defend the city, resolved to abandon it; but first sent for his prisoner and bespoke him in the following terms. “ Duke of Gueldres; you are my prisoner, “ *and I am your master*; you are a gentleman, and “ loyal to your word; you have promised and sworn “ by your faith; that you will follow me into what- “ soever part I shall go. I know not whether it is “ you who have sent for the Grand Master of Prus- “ sia, but he is at our gates, and I shall not wait for “ him. You are at liberty to stay behind if such is “ your will; but I shall carry your *faith* along with “ me; you shall follow me to such a place;” (and he named a castle in a very difficult and distant country.) The Duke suffered him to depart in silence; and accompanied the Grand Master to his city of Cammisberg; (*probably Koningsberg*) where every one wondered at his adventure. He afterwards however began to reflect that he had not acquitted himself with loyalty and fidelity towards the Esquire; (r) and resisting every representation which the Grand

(p) Froiss. ch. 129.

(q) Luy fiança prison, *par f. y.* obligation et serment, &c.

(r) Il ne pouvoit veoir qu'il fust loyeau.é, & ne sâcquicâst bien de sa foi.

Master could make him, even the proposal to obtain *absolution* from his oath;) he quitted Prussia, and following his Master, as he was called, from city to city, arrived at last at the place of his residence.

The duties of knighthood were enforced with more efficacy, and the connection of Sovereigns rendered more intimate, in consequence of several other institutions of which it will now be our business to treat.

Possibly there are none of them so remarkable or curious as that from which some of the most celebrated antiquaries have derived the origin of CHIVALRY itself; I mean what is called by Du Cange, *Les Adoptions d'Honneur en Fils*. By these, a Knight, or Sovereign, was *adopted* by some other Knight or Sovereign as his Son; his honours, and arms, were communicated to him; and the names of father and son, constantly preserved between them.

These adoptions however, which were purely of Gothic original, were essentially different from the celebrated adoptions of the Romans; inasmuch as they were solely what their name imports, *adoptions* of *honour*, and conferred no right upon the son, to the succession of his father. (s)

They were therefore in strictness, rather *alliances*, than *adoptions*, and being the pure effect of good will and esteem, must have palpably contributed to extend the connections, and improve the friendships of men.

There were various modes by which they were made; but the chief of them was the *delivery of arms* from the father to his son, a ceremony which is to be derived from very high antiquity. In a former Chapter (t) we mentioned in the story of ALBOIN;

(s) Ces Adoptions n'étoient que par honneur, et ne donnoient aucune droit au fils adoptif en la succession de celui qui adoptoit: Du Cange. Differt. 22. Sur Joinville; p. 268.

(t) Chap. VIII.

the custom of the *Lombards*, by which the son of the king was forbidden to sit at the table of his father, till he had received his arms from some foreign prince. To the Lombards, however, the custom was not confined, and a vast number of instances have been collected, with wonderful accuracy and diligence, by Du Cange, by which we discover it to have been prevalent throughout the northern nations.

This delivery of his arms to the future soldier, by some prince or state eminent for superiority of character, was coveted as a very high mark of honour and friendship, as appears plainly in the terms made use of in describing it.

“ *Per arma posse fieri filium grande inter gentes constat esse preconium.* (u)

*Desiderio quoque concordiae factus est per arma filius.*

*Ad ampliandum honorem ejus, in arma sibi eum filium adoptavit.*” (w)

All the accounts also, describe almost every adoption as having been made *inter gentes*, et *more gentium*; and the alliance, which was its evident consequence, carried upon the face of it, the strictest friendship.

There were indeed several other modes, exclusive of the delivery of arms, by which the adoption was made; as the cutting off a lock of hair, or the present of a shirt, to shew that the father and son were to be as closely united in friendship, as the shirt was in effect to the body. There were others that sprang from a less barbarous imagination; such as the joining in prayer and the holy sacraments. (x) But the chief was the delivery of arms above-mentioned.

(u) Cassiodor. L. 4. Ep. 2. 8. Ep. 9. ap. Du Cange, p. 269.

(w) Jornand. c. 57. ap. eund.

(x) Id. 272. et infr.

When this took place it was called *adoubier Chevalier*, and in consequence of the affinity between the words *aduber*, and *adopier*, the conjecture of Du Cange seems not ill founded, that from these adoptions it was, that CHIVALRY, or KNIGHTHOOD arose. (y)

From the prevalency of the idea of *adoption*, a kind of relationship was thought to exist between all those who had received knighthood, or (what is more agreeable to the ceremonial alluded to,) who had been *armed a knight* (*arme chevalier*) by the same person. The effects of this were more beneficial than may at first be supposed, and were sometimes evident to sense. In 1320, Philip of Valois, having led an army into Italy to the assistance of the GUELPHS, was opposed, and reduced to great straits by GALEAS VISCONTI, who supported the party of the GIBELINS. From his difficulty however he was relieved, solely by the circumstance of their both having been made *Knights*, in other words having been *adopted*, by the same person, CHARLES of VALOIS; in consequence of which alone Galeas is said to have proposed a negotiation, when he might have attacked his antagonist with very superior forces. (z)

The result also of this doctrine was, that those knights who were Companions of the same Order, (and thus in a more strict alliance together, than the mere *Eques Aurati*, or knights batchelors;) could never fight against one another without permission of the Sovereign. (a) Hence therefore, a new source for the extension of alliances, and the restriction of

(y) Il ne faut pas douter que la Chevalerie n'ait tiré son origine de cette espèce d'*Adoption*, qui se faisoit par les armes, et de la cérémonie, que s'y observoit, ou l'on revetoit d'armes pour la guerre, celui qui estoit adopté. Id. p. 270.

(z) Sainte Palaye, 1. 271.

(a) Brantome des duels ap. eund.



violence. The custom is well known, under which particular Sovereigns entered into a closer friendship together, by wearing each other's Orders, (as the Garter, the Golden Fleece, or the Holy Ghost,) and even to this day, the old language of *brethren*, and *Knights Companions*, is preserved among all those who wear the same Order.

At one time, this adoption may be said to have called forth the *true* paternal feelings, when it saved the life of the Marshal de Gie, who had been condemned to death; but was pardoned by the king of France, *in consequence, as it is stated, of his having conferred knighthood upon him.* (b)

Even those who only *assisted* at the ceremony of knighting a person, considered themselves in some measure, as connected with him; and hence, according to Saint Palaye, a man declined entering the lists against another, because of the relationship between them. “ Il sembla se regarder comme parrein de “ *Lancelot*, & ne vouloit point combattre son filleul.” (c) All these customs it must be owned, require not only very full proof, but the examples of them demand a constant repetition, to warrant any strong conclusions as to their influence. The tenor however of the few that have been quoted, are at least all one way, and if any effect arose from them all, that effect must have evidently been to the advantage of civilization.

It was observed above, that princes, and men of different nations, gave into this custom; and in after times when various other institutions had branched

(b) Brantome des duels ap. eund. 1. 272.

(c) Id. Ib. This however it should be observed is upon the authority of a *Romance*, which the last mentioned author contends, and not altogether without reason, is equally entitled to attention, as authority for old customs, with many of those early poems on which other historical disquisitions have been so often founded.

out of *Chivalry*, they fell upon another mode of adoption, which has been preserved ever since in Europe.

The reader is not to be told, that the whole law and science of *Heraldry*, took its rise from CHIVALRY; and when armorial *bearings* came to be universally understood, the adoption was made by the communication of the same coat. (*d*) Instances of this, lie scattered up and down the books. In the fifteenth century, *Ferdinand* king of *Arragon*, adopted the Count of *Chimay*, a Fleming, by giving him the firname and arms of that kingdom. In the next, *Charles V.* as a mark of his close alliance with the Elector *Palatine*, accorded him the liberty of wearing the Imperial globe upon his arms. (*e*) The State of Venice, granted their arms to *Rene d'Argenson*; and as a remarkable, and honourable proof of the fraternity between France and that Republic, the Ambassador of the latter, upon taking leave of the Court of the former, was always entitled to receive knighthood from the hand of the king, (*f*) a custom which remained till very lately. The late Duke de *Richlieu*, for having saved Genoa, was created a noble of the Republic, and received a grant of its arms to be worn with his own; (*g*) and the present Lord *Malmesbury* experienced, but a few years since, the most honourable proofs of affection and esteem from the houses of *Brandenburg* and *Orange*, in the permission to quarter their armorial bearings. (*h*)

This custom of adoptions, evidently gave birth to another, which indeed was nothing but a natural consequence of it; for the relations of father and son, would without much refinement, produce that

(*d*) Du Cange. Glossarium. voc. Filiolatus & Dissert. 22. Sur Joinville, p. 275.

(*e*) Puffend. Introd. à l'Hist. Un. 3. 151.

(*f*) Amelot de la Houss. 1. 370.

(*g*) Velly 336.

(*h*) London Gazette.

of brothers. The custom I mean, is that famous institution of CHIVALRY, known by the name of the FRATERNITY OF ARMS.

This also, as has been well shewn by our guide, Du Cange, is of *Scythian* original; and was wholly unknown to the *Romans*. (i) It produced the very closest union, and its forms were solemn, sometimes to a degree of horror.

Various have been the ceremonies which have attended the contraction of Alliances, or Treaties of Peace with different nations. (k) Among the antient *Scythians*, this was done by letting one another blood, and drinking it, mingled together, as a mark of the close intimacy they had sworn to preserve; and this horrid, but awful ceremony, was no doubt easily adopted upon all other occasions of sufficient solemnity to demand it. It was thus that the particular friendships of private men were ratified, and when the knights of very old times, entered into an alliance of arms together, they sometimes sealed it by the same sort of practice.

It chiefly prevailed however, among the nations nearest to those climates whence it was first derived; or those that from their neighbourhood, were obliged to have much intercourse with them, and consequently to adopt many of their customs. Thus Baldwin, Earl of Flanders, Emperor of Constantinople, so low down as the thirteenth century, reproaches the Greeks with falling in with it; "*spurcissimo gentiliū ritu pro fraterna societate sanguinibus alternis ebibitis.*" (l)

When the French also were reduced to difficulties in the Greek Empire; they entered into a fraternity of arms with the king of Cuman, and the knights on

(i) Differt. 21. Sur Joinville, p. 26 .

(k) Vide Differt. Prelim. to the Corps Diplom. by Amel. de la Houffaye.

(l) Differt. 21. Sur Joinville. 260.

either side, after mingling their blood with wine, and drinking together, called out that they were brothers of the blood. “*Chascun de leur gens d’un part et d’autre, se fissent saigner, et de leur sang, ils donnassent a boire, l’un a l’autre, en signe de fraternité; disant qu’ils estoient freres, et d’un sang; et ainsi le convint faire entre nos gens et les gens d’iceluy Roy; et meslerent de leur sang ensemble, avec du vin, et en beuvient l’un a l’autre; et disoient lors, qu’ils estoient freres d’un sang.*” (m)

Among nations however that had advanced somewhat farther in the arts of civilization, or that had begun to feel the mild influence of *Christianity*, more humane modes of entering into these alliances were adopted. Thus in the southern and western parts of Europe, they contented themselves with sending each other presents of arms; or after the manner of the heroes of Homer, with exchanging those they actually wore. They took the sacrament together, by which they swore to preserve a lasting friendship, which was sometimes still farther confirmed by *swearing on their arms*; hence after they had entered into the fraternity, they were called *Jurati ad arma*; and hence, according to Du Cange’s conjecture, the English phrase of *Sworn Brothers*. (n)

Having thus described the manner in which the alliance was contracted, I shall proceed to a detail of the duties which it enjoined; and a very slight attention to them will suffice to shew, how powerfully they were calculated, by means of their wide dissemination, to produce amendment in the law of nations. The associated parties were bound to consider one another as brothers, with respect to all operations of war; they were sworn to render mutual assistance in all enterprises; whether of attack or de-

(m) Joinville Hist. de Saint Louis, 94. Edit. Du Cange.

(n) Du Cange ut Sup.



fence; they promised eternal friendship; they professed to have but one interest; they could have but the same friends and enemies; they wore the same arms and livery in battle, in order that their danger, and their fame might be blended together; (o) and the acquisitions which they made, were always shared equally between them. Every thing short of loyalty to their Sovereign, was to yield to their mutual duties; even the more sacred flame of devotion, with which a knight, as is well known, was fired when called upon by the gentle sex, was supposed to be subservient to his duty towards his Brother in Arms, and love itself was thus forced to give way to friendship. (p)

With respect to foreign States, and knights of different nations, it was with the *Fraternities of Arms*, as with the *Adoptions*; they were contracted all over the world, and sometimes when the parties had not even seen one another; as was the case of the king of *Arragon*, and PHILIP, the good Duke of *Burgundy*, in 1458. (q) Kings, and other Sovereigns, and even whole States, entered into them; and by drawing them thus closely into the bonds of interest and affection, founded upon the very point of honour; they must have contributed powerfully to polish the rugged manners, and soften the barbarity which had so long prevailed.

They visibly interfered with many political engagements. *Henry de Translamare*, King of *Castile*, requesting the loan of a considerable sum of money from the Duke of *Bourbon*, was refused upon the sole ground of his being the enemy of *Bouciant*, the

(o) Id. Ib. & Sainte Palaye. 1. 224.

(p) Une Demoiselle ayant en vain reclamé la protection d'un Chevalier, celui ci se disculpa en alléguant le besoin dans laquelle il s'étoit trouvé pour lors, de voler au secours de son frere d'armes. Mem. Sur la Cheval. 1. 217.

(q) Monstrelet ad an. 1458.

Duke's *Brother in Arms*. (r) Possibly, the Duke of Bourbon might have been influenced by other considerations, and only fell upon this as an excuse. From that very circumstance however, the Institution was of consequence, in thus furnishing him with reasons for refusal, *legitimate* according to the practice of nations.

These alliances however as has been observed did not interfere with the duties which the knights owed to their Sovereigns. When ever therefore two Brothers in Arms, were of different nations, and war broke out between them, the alliance was *ipso facto* at an end. (s) Nevertheless it can hardly be supposed, that its effects should immediately cease. Men who had probably long continued in the closest bonds of intimacy; had shared the same dangers; and often, possibly, rescued one another from death; could not be expected to meet in battle with the same personal enmity, with which other warriors often engaged. In such a case, though bound to molest one another in the course of a superior duty; they would naturally endeavour to soften the rigours they were obliged to inflict, and would certainly never extend them beyond absolute necessity.

In the life of Du GUESCELIN by Menard, (t) there is an account of the separation of that general, and Hugh de Calverley, his *Brother in Arms*, upon the breaking out of the Spanish war. Calverley, being an Englishman, tells Du Guescelin, as a thing of course, that he must part from the alliance, but speaks in the most friendly terms of their long companionship. Bertrand waves the settlement of their accounts, which he had proposed; tells him that it was right he should follow his

(r) St. Pal. i. 230.

(s) Sainte Palaye. i. 239.

(t) See p. 248.

master ; and ends this last of their amicable interviews with a kiss, - " Moulte piteuse," adds the author, " fut la departie." Such men could never afterwards have met one another in battle, with more enmity than the mere letter of their duty required of them, and thus plainly, did this curious and beneficial institution tend to bring the maxims of EUROPE to a level with the *particular* Religion and System of Morality pursued by its nations. Thus also did they come to the *particular* and humane *application* of that *general* definition of the Laws of Nations which we adopted in a former chapter, namely, that they enjoin us to do one another as much good in peace, and as little harm as possible, in war, consistent with our mutual interests. (u)

We have an example of this at the siege of Soissons in 1414. When Burnonville, the commander of the place, was ordered to death by the French General; numbers of the latter's officers interceded for his pardon, and offered large sums for him by way of ransom. And this they did, says an old author, from esteem for his valour, and from the remembrance of the many campaigns they had made together in Lombardy and in France, *ou ils avoient ete amis, et freres d'armes*. (w)

When Du Guesclin also, so often mentioned, was leaving Bourdeaux in order to raise his ransom, he was offered thirty thousand livres towards it by his friend Hugh de Calverley, who happened to be on the spot. Calverley rested it upon the unsettled account which he said was between them for plunder and prisoners, in which he had remained his debtor. (x)

There was another point of *Chivalry*, which must have also tended much to introduce personal friend-

(u) See Chap. II.

(w) Chron. de St. Dennis ap St. Palaye. 1. 278.

(x) Vie de B. de du Guesc. 131.

ships between the warriors of the times. As the knights were perpetually passing from one country to another, in search of objects worthy their prowess, and which might give them opportunity to fulfil their oaths ; they were naturally thrown more into an intercourse with other nations than they had ever been before. By these means, they acquired a mutual esteem for one another ; their prejudices were by degrees softened down ; and the personal ferocity with which their ancestors had generally plunged into battle, was insensibly worn away. Exclusive of this, by being in a foreign land, and often in the midst of danger and distress, they were frequently under the greatest obligations to persons whom, but for this, they possibly might have been taught to hate. It indeed had a plain effect upon the very terms and institutions of CHIVALRY ; and whenever these military wanderers had received marks of hospitality or other kindness in distress, they swore eternal friendship to their benefactors, professed themselves to become their *grateful* knights, and accordingly were expressly called *Chevaliers de Reconnoissance*. (y)

Hitherto we have considered the influence of *Chivalry*, merely as it concerned the conduct of individuals ; we have still to examine it, as it affected the general operation of States, when they were called into action against one another. In this, the most obvious feature is the care and regularity with which they warned one another of their intention to put on the character of *Enemy*. The old Roman *punctilio* in this respect, which had been totally overlooked among the Scythian nations, whose indiscriminate passion for slaughter deemed it unnecessary ; revived with augmented vigour, during the growth of *Chivalry*. It was beneath the honour-

(y) Mem. sur la Chev. i. 235.



able enmity of a *Knight*, who was ever scrupulously ruminating upon what was expected of his character, to invade an enemy unawares; he scorned to take advantage of him, even in the heat of combat; much less could he deliberately make an attack which all the rules of courtesy would have forbidden. When driven therefore to open war, it was a necessary consequence to inform his enemy of it, and the intention was denounced in the most solemn manner by an officer whose function was generally considered as sacred and inviolable. Hence arose modern *Declaration of War by Heralds and Pursuivants*; a ceremony which, it must be owned, seemed originally to spring from magnanimity alone, without any more refined views of *first demanding reparation*, or the necessity of authorising *legitimate* war. But whatever was the motive, the effect was the same; and the world made no small flight from that abyss of disorder, which had spread over it during the earliest ages, in introducing this necessity for a *declaration of war*, before hostilities had commenced.

We have a full example of this, in the war between Edward III. and Philip of Valois. The celebrated *Walter Manny*, in the true spirit of *Chivalry*, had sworn to the ladies that he would be the first to enter France and take a town.

The same spirit however, forbade him to stir a step, till the numerous negotiations that were pending were determined; and a declaration *in form*, being at last sent by the bishop of Lincoln, he waited, says Froissart, till he knew, or at least guessed, that it had been published, and not till then, broke in at the head of forty lances. (2)

These declarations were made in various ways; for the most part by *Heralds*, and sometimes by *letter*.

(2) Froissart, v. i. ch. 37.

The declaration of CHARLES V. against EDWARD III. is minutely described by Froissart. It was done by a *letter*, the bearer of which was only a servant; who upon coming into the presence of the king, fell upon his knee, and entreated him to read the contents of his packet, which, as he observed, he neither did, nor ought to know.

The king was surprised at the message; and more at the letter being borne by a common servant; he shewed it to his Council; they examined every part of it, turned it on every side, and at length, *upon observing the Seals*, pronounced it genuine, and gave orders accordingly for the war. (a)

In the declaration of EDWARD IV. against LEWIS XI. we find the very essence of regularity. It was written, says *Commynes*, in fine language and style; and sent by Garter King at Arms. It required him in express terms, *to deliver up the kingdom of France to him as his right, in order that he might restore to the Church, the Nobles, and the People, their antient liberty*. In the case of refusal, he protested that all the evils of the war would fall upon the head of LEWIS.

The King received the Herald well; and dismissed him with a present of three hundred crowns, and thirty yards of crimson velvet. (b)

In the twelfth chapter, we saw the extent and prevalency of private wars under the *Feudal System*, and these although carried on by mere subjects, were however conducted with all the formalities that attended the more important quarrels of nations. The necessity and form of the declaration were points, as it was observed, universally laid down; and as the practice of private war, was one of the earliest and most universal in Europe, and the use of *Heralds*, and these *solemn declarations*, was at its height,

(a) Froissart, 1. ch. 252.

(b) Commynes, L. 4. Ch. 5.

as a science, some time after the commencement of the period before us, it is not improbable that this general practice of independent nations, arose out of customs first adopted by inferior vassals. (c) The seventeenth chapter of the Golden Bull, which regulates the manner of commencing war among the German princes, (d) contains such excellent principles that the most civilized States might derive improvement from their inspection.

“ Eos, says the law, qui de cætero adversus  
 “ aliquos, justam *diffidationis* causam se habere fin-  
 “ gentes, ipsos in locis ubi *domicilia non obtinent*,  
 “ aut ea communiter non in habitant, intempestive *diffi-*  
 “ dant ; declaramus damna quæcumque per incen-  
 “ dia, spolia, vel rapinas *diffidatis* ipsis, cum honore  
 “ suo inferre non posse.

II. “ Et quia patrocinari non debent alicui *fraus*  
 “ et *dolus*, præsentì constitutione in perpetuum va-  
 “ litura sancimus, *diffidationis* hujusmodi quibus  
 “ cumque dominis aut personis, cum quibus  
 “ aliqui fuerunt in societate, familiaritate, vel ho-  
 “ nesta quavis amicitia conversati, sic factas vel  
 “ *fiendas in posterum non valere* ; nec licere prætextu  
 “ *diffidationis* hujusmodi cujuslibet quempiam inva-  
 “ di per incendia, spolia, vel rapinas, nisi *diffidati-*  
 “ *onis per tres dies naturales ipsi diffidando personali-*  
 “ *ter, vel in loco quo habitare consuevit, publice fuerit*  
 “ *intimata* ; possitque de intimatione hujusmodi, per  
 “ *testes idoneas* fieri plena fides. Quisquis secus  
 “ quempiam *diffidare* vel invadere modo præmisso  
 “ præsumperit, *infamiam* eo ipso incurrat, ac si nulla  
 “ *diffidatio facta esset*. (e)

But of all the customs of war, which drew their origin from the spirit of *Chivalry*, no one is more remarkable than that noble confidence in one ano-

(c) See Chap. XII.

(d) Anno. 1356.

(e) See the *Golden Bull*, Cap. xvii. de *Diffidationibus*. ap. Du Mont.

ther displayed by enemies, in agreeing to meet regularly in battle at a particular time and place, subject to particular conditions.

The same magnanimity which deemed it necessary to warn an enemy by a regular declaration against him, went so far, after hostilities had commenced, as to tell him the *precise-hour*, and the very *spot*, of the intended attack. Sometimes also the Chiefs would fly out of the ranks to meet one another. They were generally known by their arms, or they themselves, before the shock, discovered to each other, their names and reputations for feats of *Chivalry*, in language and manner resembling the heroes of Homer. At the battle of the bridge of Lussac, the celebrated CHANDOS, while in the act of attacking them, accosted St. *Julian* and *Carlou-net*, the French leaders, in the following terms: “ It is now a year and a half since I have fought you, “ and God be thanked you are now before me ; we “ will now see who is strongest in this Country, you, “ or I ; my name is JOHN CHANDOS ; I have “ heard of your great feats in arms, and you have “ here an opportunity to prove your reputation.”  
(f)

Amid the numerous battles and sieges which every day took place, during the same war of Edward III. against France ; we have frequent occasion to observe this great regularity : In 1339, the armies of that prince, and Philip, drawing near to one another in Picardy ; there went, says the historian, on the Wednesday, a herald to the French camp, to tell the king that EDWARD of ENGLAND had halted in the field, and sent to demand battle with him, power against power. King Philip willingly accepted the challenge, fixed upon the Friday following for the combat, and the herald returned



to the English camp well furnished with beautiful mantles of fur, which had been given him by the king of France and his lords. (g) The same ceremonies were practised, near a century afterwards, previous to the battle of Agincourt. Heralds had come frequently to the king of England with offers of battle from the French. Henry contented himself at first, with saying that he would not avoid the combat. On the 22d of October however, 1415, another challenge being sent, he accepted it, and made a present to Mountjoy St. Denis, (h) who brought it, of a robe worth two hundred crowns. (i) The same practice occurred again, previous to the battle of Verneuil, won by the Duke of Bedford in 1424, (k) and the famous battle of Flodden Field was fought by a like appointment. Previous to this last, the *Earl of Surry*, says *Speed*, sent Rouge Crosse to king James, with proffer of battle, *to be done* upon Friday the month of September, (1513). The herald also bore a message from the Lord Admiral, that he was come *in person* to justify his act against Andrew Barton, and would abide the last drop of his blood in the vant' guard of the field. (l) This Andrew Barton had been a famous pirate, and while the two nations were at peace, had been attacked, and slain, *in a private expedition* of the Admiral, then only Sir Thomas Howard, which had been much resented by James; and we have here a fresh instance of the manner in which the differences of *Individuals* entered into and coalesced with public national quarrels.

(g) Froiss. v. 1. ch. 41.

(h) The principal Herald among the French, answering to our Garter King at Arms.

(i) Villaret. 3. 170.

(k) Monstrelet.

(l) Speed. 767.

There are various other examples of the practice we are recording, which as it has been sufficiently illustrated, it would be unnecessary to mention farther. (m) But we cannot quit the point without taking notice of a case particularly evinative of this spirit in the celebrated letter of *Henry de Transtamare*, to the *Black Prince*, in 1367, when the latter was about to enter his kingdom in order to restore Peter the Cruel. "We wonder," says the Castilian, "at the reason which can induce a prince of your power to invade the poor territory which God has given us, but as we know you possess the favour and fortune of arms, more than any other prince of your time, and that you therefore ardently seek the combat; we request you to point out *by what pass you mean to enter our country*, and we will meet you there and give you battle. (n)"

These challenges between whole armies, which ended generally in what are called *pitched battles*, arose I think evidently from that spirit of the times, which induced men to seek personal combats or duels, one against the other. The wide prevalency of the custom of *Duelling* among our ancestors, in judicial, as well as military matters, is too well known to be discussed; and this custom transfused itself easily into the quarrels of nations. Kings, and Generals, were not unfrequently the most distinguished knights of their time; and when they met at the head of armies, they were often more willing to shew their personal prowess in the lists, than their powers of generalship, in combining and managing the force of their troops. It was besides customary in those times, for the personal quarrels of these high characters, to be the sole or chief quarrel of

(m) See however Monstrelet. v. 2. ad ann. 1441. when the Duke of York *challenged* Charles VII. to a *pitched battle*, on the banks of the *Oise*.

(n) Froiss. v. 1 ch. 237.

the nations they commanded ; and from both these causes arose the custom of *challenges* to single combat, between the leaders of armies, so universal in the practice of the earliest nations. Illustrious instances of this, are prominent in the history of the world. One of them, in the eleventh century, occurs in the challenge of the Emperor Henry IV. to the Duke of Swabia, upon a report, spread by the latter, that he meant to assassinate him ; (o) and in the twelfth, it is said that Philip Augustus offered to settle his differences with Richard I. by a combat of five on a side ; a challenge which Richard accepted, *provided the two kings should be of the number.* (p)

When EDWARD III. challenged the realm of France from PHILIP of VALOIS ; in order, as he said, to spare the effusion of Christian blood, and the evils, which they were bound as much as possible to prevent, from falling on their kingdoms ; he proposed by a Herald to terminate the difference, either by *duel*, or by a combat of one hundred on each side. He addressed the cartel simply to Philip of Valois without the addition of his title of *king of France* ; which made him return, that he was not bound by *law* to take any notice of such sort of address ; nevertheless, if Edward would stake the kingdom of England against that of France he would enter the lists. (q) A similar conduct was observed by Henry V. some little time before the battle of Agincourt, who challenged Charles VII. to battle, *the kingdom to depend upon the issue of the contest.* (r)

The usurpation of the father of this last king, produced a challenge, and a regular declaration of war from two private noblemen, friends of Richard II.

(o) Heiss. i. 73.

(p) Diceto. 676. 50.

(q) Tho. Walsing. 149.

(r) Speed, 642. Rymer, 19. 314.



who in the very spirit of knighthood, stood forth as his champions on this occasion. The first was from the *Duke of Orleans*, who reproached him with the death of the king of England, and bade him fix upon any place between *Bordeaux* and *Angoulême*, there to combat with a hundred knights of a side. Henry answered by giving him the *LIE DIRECT*. "By the honour of God, of our Lady, and St. George," said he, you lie *falsely* and *foully*, when you say we have had no pity on our late Sovereign." (s) The *declaration of war*, was from the Count of Saint Pol, and was conceived in language the most regular and precise. He accuses him in direct terms, of the murder of Richard, which (the king being his friend and Brother in law) he says; "he should think himself worthy of the indignation of the Deity, and of all honourable persons, if he did not revenge." Wherefore, he continues; "par ces presentes, vous fais a savoir, qu'en toutes manieres que je pouvay, je vous nuiray, et tous les dommages, tant par moi, comme par mes parents, tous les hommes et sujets, je vous feray; soit en terre, ou en mere. (t)"

But the most celebrated example of this kind, appears in the course of the quarrel for Sicily, between Peter of Arragon, and Charles of Anjou, in 1283. The unfortunate *CONRADDIN*, whose story has already been touched upon under another head, (u) when he ascended the scaffold at Naples, threw his glove among the people, and begged that whoever got possession of it, might carry it to his Cousin the prince of Arragon. The laws of *CHIVALRY*, which were those of the times, gave much consequence to this action, unimportant as it would appear in modern days; to throw down and take up a glove or

(s) Villaret, 2, 410.

(t) Monstrelet, v. i. ch. 13.

(u) Chap. IX.



gauntlet, being considered as nothing less than an offer, and acceptance; and the slender title of Peter, received no small support from it. (v) A fierce war broke out between the rivals; in the course of which, the Arragonian being driven into great straits, with his whole army, sent a challenge to Charles, to end their difference by a combat of an hundred on each side. The spirited Angevin, though at that time sixty-three years of age, (w) made no scruple to accept the proposal; all general hostilities were immediately suspended; and commissioners were appointed to draw up the conditions, by which it was agreed that the vanquished, or he who failed to come to the field, should be esteemed *perjured; false; unfaithful; a traitor; eternally infamous; unworthy the name and honour of a king; and incapable of all dignity.* (x) The king of England, EDWARD I. was requested on this occasion to be judge of the lists, which he personally declined; he however assigned to them a field of combat in the plain of Bourdeaux, a neutral territory, and his *Seneschal* was sent to hold the Court in his name. It was in vain that the Pope interposed in this affair, by shewing Charles that the proposal of the king of Arragon had been merely to gain time; by excommunicating the latter prince; and threatening even himself with the same fate if he proceeded: The honour of *Charles* was pledged, and he would for ever have been a stain to CHIVALRY had he declined a challenge which he had once accepted. He therefore appointed his son, regent of his kingdom; provided his army with proper generals; and repaired to *Bourdeaux* with his hundred knights.

The event of this remarkable affair is not without curiosity, and has given occasion for much dispute

(v) Giannone. 19. 2.

(w) Burigny, 2. 210.

(x) Rymer, 2. 227. 228. 229.

between the Spanish and French historians. It is agreed on all sides however, that the king of *Arragon* repaired also to *Bordeaux*, and appeared before the *Seneschal* (some say in the disguise of a simple Esquire) the evening previous to the day of combat. He here declared that he had certain authority, for supposing the king of France, the nephew of *Charles*, (who it is also agreed had approached the English frontiers well attended,) meant to surprise him; that he therefore could not go into battle in proper security, and he thought it right to retire from so hostile a neighbourhood, leaving in the hands of the *Seneschal*, his casque, his sword, and his lance, as marks of his appearance. The matter here ended, and both kings filled the world with manifestoes: those of the *Spaniard*, directed against the king of France; those of *Charles*, reproaching his antagonist with cowardice and perfidy. (y)

In the course of the same quarrel, about a hundred and fifty years afterwards, another challenge ensued between the heads of these rival houses; and though differently related by the writers of the two parties, there is a considerable proof of regularity in both. One account states, that *Rene* duke of *Anjou*, the pretender to the crown, challenged *Alphonso* king of *Arragon* to single combat, which was at first refused *because their ranks were not equal*, but was afterwards accepted. The meeting however was prevented by the nobles of *Rene*, on the plea *that their interests being concerned, he had no right to engage without their consent*.

According to the other relation, the challenge was not to *single combat*, but to a *general battle*. *Alphonso* accepted it, insisted that the *challenged* had the pri-

(y) For the challenges and articles of combat in this affair, see Rymer, *ibid.* for other particulars Nangis. *Contin. of Joinville.* an 1283. Velly, 3. 399. et *infra*.

vilege of appointing time and place, and fixed upon the plain of Nola, where he waited for Rene eight days. On the other hand, *Rene* claimed the right to appoint time and place as being the *challenger*, and sent to tell Alphonso that he would attack him in his camp. The affair went off upon this point; but however it might have been determined, the dispute itself discovers a great advance in the laws of war.

As these combats most probably took their rise from the practice of duelling in judicial matters, it is not unwarrantable to imagine that they partook in a great measure of the ceremonial observed in the latter. The following oath, administered by the Wardens of the lists, is a curious part of it, and well describes the distrust, and superstition of our ancestors. "A de B. ye shall lay your hand ayen on the holy  
 " gospels, and swere, that ye shall have no moo wep-  
 " nes, or poynts, but tho that had been assigned you  
 " by the constable and mareschall; that is to wite,  
 " gleyve, long swerd, skort swerd, and dagger; Nor  
 " no knyfe, small ne grete, ne none engine, ne none  
 " othir instrument with poynt. Nor ston of vertue,  
 " nor hearbe of vertue, nor charme, nor expere-  
 " ment, nor none othir enchauntment by you, nor  
 " for you, whereby ye trust the better to overcome  
 " C. de D. your adversarie that shall come ayens you  
 " within these lists in his defence." (z)

In general, the reward of the Victor in these combats, was something substantial and fixed before hand, exclusive of the honour acquired. The ransom of the vanquished, in case he was left alive, belonged to him of course; and in that case also his body, as a mark of entire submission, was to be car-

(z) Dugdale Orig. Jud. p. 82. See also other curious particulars from 75 to 86.



ried out of the field as if he had been actually slain. (a)

In the combat between Du Guescelin and Truffel, a hundred gold florins was staked to be paid by the vanquished as a treat for the persons who had charge of the lists.

In a combat of seven English against seven French knights near *Bourdeaux*, in 1402, it was stipulated before hand, that each of the vanquished should pay a diamond ring to the victor. (b)

In the challenges above mentioned, we saw *whole kingdoms* proposed as a stake, to remain with the victor, and hence I think very probably arose another custom of CHIVALRY, which without doubt has been the foundation of our present laws of war. It was a received practice it seems, when a place that was besieged was hard pressed, to offer to surrender, "provided no army came to its relief within a fixed period;" and in case it did, the besiegers were bound "to wait for it, give it battle, and the place was to remain with the victor." This point is laid down by M. de Sainte Palaye, (c) though contrary to his usual practice, he gives no examples of it. I however discover one exactly in point, and there are a variety of others which approach very near it.

In the year 1373, the French pressing the siege of *Brest*; the garrison agreed to surrender, "if within six weeks an English army did not arrive, strong enough to meet them in the field, and give them battle."

(a) See the particulars of the combat between Du Guescelin and Thomas of Canterbury, where the latter, having his life given him, was nevertheless borne out of the lists as if he was dead *C'estoit la coutume*, adds the author, d'emporter ainsi les vaincus, quand leur ennemy, leur avoit donné la vie, quoy qu'ils n'eussent pas été blesez. Vie de B. Du Gueic. 35.

(b) Villaret, 2. 411.

(c) Mem. sur la Cheval. 1. 196.



The succouring army was also bound, “not to throw any relief into the place, until they had actually waited the issue of the combat;” and hostages were given for the performance of the whole. Within the time, the EARL of SALISBURY arrived with a large fleet, but few soldiers; and the French General, DU GUESCELIN, who lay encamped in expectation of his arrival, sent to him to give battle according to the agreement. The affair forms *a case* in the laws of the times. SALISBURY remained seven days within strong intrenchments, without succouring the town, or attacking the French; but on the seventh, he sent to tell *Du Guescelin*, that he must fight that very day, or the next he would throw in the promised succours. The Constable accepted the challenge, but SALISBURY then pleaded that his men were chiefly *Sailors*, and that he wanted Cavalry, with which he even required his enemy to furnish him; at all events protesting that as he had none, he would not stir from his intrenchments, which the other was bound to attack or give back the hostages. Neither the one nor the other was done; and great debates arose upon this in the English camp; one party contending that if they did not go out to give battle, they could not, according to the conditions, relieve the town; (*d*) the other affirming that it was sufficient they were upon the spot, and ready for action; that the field of battle was not stated; and that every good general endeavoured as much as possible to chuse his own ground. This last opinion carried it, and the place was succoured at the expiration of the time. On the other hand the French contended, that the words *to give battle*, meant an offensive operation, and not the defence of intrenchments; that

(*d*) It is to be observed that the English being all along masters of the *Sea*, could have succoured the town when they pleased, and were only restrained by the laws of their agreement.

SALISBURY was bound to attack them, and not wait for the attack himself; and as the town was relieved, contrary, as they said, to the Treaty, they marched off the field without parting with their hostages. (e) The affair is not without its difficulty, but which ever way it might have been settled, to be able to start such difficulties discovers a pointed advance in laws of war considered as a *Science*. During the same war, several other sieges exhibited the same sort of practice, as that of *Derval*, (f) where the conditions not being fulfilled, the hostages were put to death; and of *Moissac*, where no relieving army appearing, the place was surrendered. (g) The custom appears several times afterwards, and indeed is well known in the annals of modern war. At the famous siege of Harfleur in 1415, the soldiers taken, were allowed their liberty, upon promise to repair to Calais as prisoners, “provided the king was not overtaken in his march thither and defeated by a hostile army; (h) and the people of Bourdeaux being much reduced in 1451, a regular treaty was drawn up for the surrender of the whole of Guienne, “in case the king of England did not, within a certain time, send an army sufficient to protect the town, to give battle, and to defeat the French.” In consequence of this the French army on the appointed day presented themselves before the walls; proclamation was made several times by the inhabitants, *summoning the English to assist them*; and at sunset, none appearing, the French retired within their camp, and the capitulation was executed the next day. (i)

(e) Vie de Bert Du Guesc. 243, 244, 245.

(f) See Chap. IX.

(g) Froiss. v. ch. 320.

(h) Villaret.

(i) Villaret, 4. 247, 249. The words of the proclamation were, *Secours de ceux d'Angleterre, pour iceux de Bourdeaux.*

Such is the pointed regularity and improvement which the Law of Nations received, from the celebrated institutions of CHIVALRY. Institutions which have long gone by, and faded before the general improvement of manners which time has brought on. In the ages however when they flourished, they were of essential consequence to the well-being of the world, and as far as they went, supplied the place of philosophy itself.

## CHAP. XV.

## OF THE INFLUENCE OF TREATIES AND CONVENTIONS.

THE FEUDAL SYSTEM, though it introduced a more regular order of things, can scarcely be said to have improved the Law of Nations. CHRISTIANITY, as we have seen, did both good and harm; the former, while its precepts were properly enforced; the latter, when they were corrupted by an ambitious Church. CHIVALRY tended in the most direct manner to amend it; and at length by TREATIES and positive CONVENTIONS, Nations were habituated to attend to it, with that minuteness of investigation which approached to Science. It is of these last that we have now to treat, and though the materials which the earlier ages afforded, are barren in comparison with those of later times, the enquiry will not be altogether ungrateful.

By *Treaties* and *Conventions*, I do not mean merely those *Agreements* which men fell upon, in order to bring about a cessation from *War*; but all those *DEEDS*, (whatever they were,) by which some uncertainty was put out of doubt; some contingent difficulty smoothed away; and the natural rights of mankind not unfrequently trenched upon, in order the better to enjoy those that remained. This had long been adopted by what was called the municipal law, and society was yet young when it was widely disseminated. Yet the Law of Nations, as we have seen, had gone on long before the Sovereignities of the world had thoughts of fixing, by solemn *Convention*,  
any



any part of the uncertainty of the state of nature, in which they were supposed to continue.

As however the Individuals of a particular Society, for its better support, made daily invasions upon the law of nature by *consent*; so the States of the world found they could uphold the kind of Society which they observed among one another much better, by *consenting* to things which by the law of nature would at least have been left doubtful.

Amid the barbarous eruptions, and during those violent throes which gave birth to the present States of Europe; ferocity, and the right of the strongest were so predominant in all operations, that men were extremely irregular even in the savage customs which governed them. They thought very little indeed, of proceeding upon any fixed rules, and still less of the refinements which are generally their attendants. Some sort of agreements no doubt they had, for the better conduct perhaps of their military operations; and when exhausted in their endeavours to destroy one another, they might be made to comprehend the nature of a *Peace*, or rather of a *Truce*. But of the utility of those conditions which were to decide upon future conduct, or which admitted of any nicety in their construction, they seem never to have been aware.

It was reserved for the ages before us, to witness the birth of those complicated interests, in consequence of the growing connections and the *Conventions* of States, the knowledge of which it required no little attention to obtain, and which in later times compose that extensive and interesting Science called the DROIT PUBLIC. Even in this period, the difficulty of settling a number of contending rights among violent and unenlightened men was so great, that they were generally induced to content themselves with mere *Truces*, and nothing therefore is more common through all the histories, than the ex-

*piration or the renewal of the Truce* ; by this the contracting States agreed to quit the character of enemies, though they could not become friends, and so hard was sometimes the task of finally settling an intricate contest, that a truce was actually once entered into by LEWIS XI. and EDWARD IV. to continue in force *one hundred years* after their deaths. (a)

We have already remarked, (b) that the periods previous to the eleventh century, had witnessed few *written Conventions*, except such as relate to ecclesiastical matters. But the closer intimacy of States after that æra, the causes of which we have just been contemplating, not only added to the number of their *Treaties*, but produced much variety in their nature and quality. Accordingly, from the eleventh century we have occasion to observe, a number of *Treaties* (and those perpetually increasing) relative to the marriage of Princes ; the exchange, or sale, or other settlements, of their dominions ; the terms of their alliances ; suffrages for the Emperor ; or leagues for mutual defence. The connections of Society were extended, and the business of Europe began to thicken, as the laborious volumes of an infinite number of *Fœdera* bear ample witness.

By these, the nations that were emerging from the grossness of ignorance, became acquainted with other modes, than the savage one of war, by which to *alienate*, or *exchange* the Sovereignties and *dominions* which they legally possessed. By these, they acquired a just power of taking part in one another's affairs, founded on rights, different from the brutal one of the strongest, which had hitherto governed them. By these, also, nations far distant, were introduced into a friendly intercourse together ; mutual prejudices began to give way ; the ruggedness of one set

(a) The Treaty is in Fred. Leonard, tom. I. 217.

(b) Chap. VIII. ad. fin.

of manners participated of the polish of another; Commerce was extended; and even new States arose *peaceably* out of old ones, certainly without extermination, and almost without blood.

Hence the compiler of the *Traites de Paix* from the Peace of *Vervins* to that of *Nimeguen*, has by no means been ample enough when he divides all Treaties under four heads, namely, those of PEACE, of TRUCE, of CONFEDERATION, and of COMMERCE.

(c) The whole history of Europe, and particularly the view we have taken of it, demonstrates that the Conventions of men have a much broader foundation to build upon, and it will be the object of the following divisions to prove the truth of the observation.

I am well aware that it may be questioned in this place, how far the particular rights conferred or taken away by *Treaty*, are the result of the *Law of Nations*. That law, it may be said, permits us to agree upon certain points by *Treaty*, which points, when agreed upon, become legal by that *Treaty*, and not by a general *Law of Nations*; so that accurately speaking, all that the latter amounts to on the subject is, the one general proposition, "that we may determine upon certain things by agreement."

All this is incontrovertible; but there is still something left for the law to do, with respect to what shall form the *subject matter* for Convention to work upon. For though it may leave a vast number of points at the absolute discretion, or even caprice, of Convention; it by no means goes so far as to say, that any thing which the heart of man can devise shall be "legal, because it is determined upon by previous Institution." We have seen that the Christian morality, is the true foundation of the Christian Law of Nations; however strong therefore



men may chuse to render any point they may have in view by *Institution*, it is not the less unlawful, if contrary to the principles of the Christian morality.

For example, if one nation shall publish before hand to the world, by a solemn deed, or vote, or by some other public Institute, that henceforward it will propose to itself for the prime object of its politics, to raise commotions among all its neighbours, or to destroy all the existing governments in the world, because *they* think their Constitutions not founded in *freedom*: This solemn deed, or vote, or public Institute, is not, *on that account* legitimate according to the Law of Nations, *at least among those who pursue the Christian morality*. If the nation however thus publishing such a deed, does *not* pursue the Christian morality; or quits it after having pursued it; or *votes* it a forgery; *then* it may indeed conceive its conduct to be lawful, *according to a law of nations of its own*, though at the expence of being driven from the pale of those nations who pursue a different one. Such has been the conduct of the *French Republic*.

On the other hand, if any two nations, professing still to abide by the Christian morality, enter into a Treaty together to do that which is *absolutely contrary to the laws by which they profess to be governed*: Such an object though stipulated for by Treaty, is equally unlawful with the other. If therefore they agree by *Treaty* to annihilate, or swallow up a particular State that has not offended them, merely because the conquest of that state is convenient for them; no one can say that such an object is lawful *because sanctioned by Treaty*. Such has been the conduct of Russia and Prussia. (d)

We see then how the points stipulated for by Conventions are dependent upon the Law of Nations; Not because the *Law* asserts that particular things are le-

(d) Towards Poland.



gitimate which are only rendered so by *Institution*, but because it can lay its finger upon what shall *not* be legitimate. (e) In this respect therefore it bears a close resemblance to municipal law.

The latter cannot determine that an individual owes a particular duty to another individual, which has not before been prescribed; until it is pleaded that he does so by express convention, or deed. It can point out however what an individual shall never owe to another, in spite of all the Conventions in the world. A contract from A to sell a certain commodity to B. is binding. A contract from A. to pay so much money to B. *provided he kill the king*, can never bind.

We proceed then to consider the effect which Convention has had upon the law before us, in conferring certain rights upon men which they would not have had by mere natural law. And first of its effect on the peaceable alienation or other change of *Sovereignty* and *Dominion*.

This was brought about, exclusive of the right of Conquest, by Treaties of *Marriage*; of *Sale* or *Exchange*, by *Renunciation*; by *Bequest*; by *Gift*; by Treaties of *Protection*, or what was called an *Unequal Alliance*; and by Treaties of *Confederation*.

(e) Item fœdera pacis et Induciarum possunt sub hoc capite collocari; non quatenus servanda sunt postquam sunt facta, hoc enim potius pertinet ad JUS NATURALE, sed quatenus admittenda sunt et non neganda, quando debito modo et rationabiliter petuntur: hoc enim licet sit valde consentaneum rationi naturali, tamen usu ipso, et JURE GENTIUM videtur magis formatum, et sub majori esse obligatione.

Suarez de Leg. ac Deo Legislat. L. 2. C. 19. S. 8.

## OF TREATIES OF MARRIAGE.

AMONG the nations of Antiquity, and the Infidel people of modern times, the effect of marriage upon the political conduct of States was very small. The form of government which prevailed in the Republics of Greece and Rome did not admit of any *personal* rights of sovereignty; and even after the establishment of the Emperors, there are no instances of the annexation of any dominion to their female progeny. Among the *Mahometan* nations the well known contempt in which their women were held, even by their religion, was a still greater bar to this sort of Constitution. The *German* and *Scythian* nations however, amply repaid to the sex, the injustice which they had sustained from others; and by far the greater number of them admitted females to almost equal rights, in this respect, with their brothers and husbands. But as the husband became the administrator of his wife's power during her life, and the children succeeded of course to the enjoyment of their inheritance, this law of the Western nations, became an obvious channel for the transfer of dominion; and different States were thus united into one great Empire, or one Empire was split into different States, by means the most regular and peaceable, and nearly peculiar to EUROPE.

The reader's own observation will have pointed out to him a variety of instances of this, throughout the kingdoms of the north and west. The vast power of the English in France; their sovereignty over almost the whole western coast of that country, and the claims of EDWARD III. and HENRY V. to the crown itself, arose from the marriages of different branches of their royal family with different

powerful heiresses. (*f*) The union of the two kingdoms of Britain; the aggrandisement of the House of Austria in Flanders; (*g*) and the resumption of many of the greatest fiefs by the crown of France, (*h*) by which alone it was rendered truly formidable, all flowed from the same source.

The little kingdom of *Navarre* discovers to us many of these revolutions. At one time it stood single among the states of the world; at another, it was annexed to France in the person of LEWIS HUTIN, by the marriage of its heiress with his father. Upon the failure of his male issue, it was agreed by *Treaty*, that the right to it should remain as it were in abeyance, till it was seen whether his successors, PHILIP and CHARLES, should have sons; which contingency not happening, it passed, several years afterwards, into the family of *Evreux*, the head of which had married the heiress, and was held with the county of *Evreux* for many years, it afterwards passed again, by one marriage, into the family of *Albret*, (the county being separated from it,) and thence, by another, into that of Bourbon, by which it became again united to the crown of France.

In *Germany*, the single duchy of *Austria* extended itself into an immense dominion, by the acquisition of Spain, Bohemia, and Hungary. (*i*) In *Spain*, twelve independent communities coalesced into one. In *Italy*, a variety of states augmented the power of others, as the fortune of the houses of *Suabia*, of *Anjou*, of *Arragon*, or of *France*, could prevail; and all these

(*f*) As the marriage of Henry II. with Eleanor of Guienne; of Geoffry with Constance of Bretagne; of Edward II. with Isabel, and a variety of others.

(*g*) By the marriage of Maximilian with the heiress of *Burgundy*.

(*h*) Particularly by the marriage of Charles VIII. with Anne of Bretagne.

(*i*) Puffend. Introd. à l'hist. 5. 251, 423, 424.

revolutions,

révolutions, and the *legitimate* assertion of rights and claims, which arose, in consequence, among the powers of Europe, sprang solely or chiefly from the prevalency of this part of their Law of Nations.

The kingdom of France alone, by the wisdom of the Salic law, escaped dismemberment; and it is really wonderful to consider how much this mode of alienating dominion operated upon the politics and interests of the world, the leading features of which were almost entirely formed by it. The long wars of France and England, the perpetual jealousies of the Houses of Austria and Bourbon, and the great quarrel for Naples and Sicily, which so long divided the southern nations, may be absolutely traced to it. (7)

But when marriage was thus made the instrument of changes so immense in the Jus Publicum of Europe, we may suppose that there were a variety of points to regulate, before they were allowed to take place. The numerous contingencies to which they might give birth; the diversity of claims which many Powers might have, if left unsettled; the difficulties which the municipal laws of a state might throw in the way of the law of nature; all these it was necessary to arrange, before steps of such importance could be taken: it could not be left to chance, or to verbal-agreements, or to uncertain customs; and this arrangement, therefore, it was the

(7) By the marriage of the Emperor Henry VI. with the heiress of the Norman family, in the twelfth century, those latter kingdoms passed into that of Suabia; by which, says Voltaire, twenty provinces were subjected to Sovereigns, whom nature had placed three hundred leagues off them, and whose quarrels in support of them prove the wisdom of the Salic law. From the house of *Suabia* they passed into that of *Aragon*, whence may be derived the foundation of all the wars between Ferdinand the Catholic, and Lewis XII. Charles V. and Francis I. and partly therefore of the hatred which has perpetually subsisted since between the French and Spanish nations.



peculiar business of *Treaties* and *Conventions* to form. "Quum in dubium venit." (says the treaty of marriage between John of England and the eldest daughter of Humbert Count of Savoy,) "quod a memoria recedit, repertum est in rei gestæ testimonium, "perhennis rescripti remedium." (k)

The Treaty goes on to vest in JOHN the whole of the Count's territories, in case no son is born of the marriage; but if there is a son, it vests them in *him*, and gives to JOHN only the county of *Roussillon*. If the eldest daughter dies before marriage, John is bound to espouse the second; and if he marries the eldest, the second is not to be betrothed without the consent of his father, HENRY II. until the first marriage has been consummated. The Treaty is ratified and signed by forty-nine nobles on the part of the Count, who swear that in case he recedes from it, they will, either with or without summons, surrender themselves as hostages to the king of England.

The preamble to the treaty of marriage between WILLIAM king of Sicily, and Jane, daughter of the same king Henry, in 1178, sets forth that the former is urged to it from conviction of the great bond of union *marriage* is calculated to produce between men. "Rerum foedus et concordiam, humanarum, inter cetera pacis bona, ligat fortius et "astringit, vinculum conjugale," &c. (l)

In 1193, the marriage of Philip, son of Baldwin Count of *Flanders*, with the daughter of Peter Count of *Nevers*, was made the instrument of the peace between those two sovereigns, *and of the transfer of the territories that had been the cause of their contest*. If Philip died before consummation, the treaty for the dowry was still to continue; and Hen-

(k) Rymer's Fæd. i. 33.

(l) Rymer's Fæd. i. 92.

ry, another son of Baldwin, was to marry the lady.  
(m)

In 1210, John king of *England* wishing to form an alliance with Alexander of Scotland, agrees to give him his eldest sister, *Jane*, in marriage, by a particular time; and in case he is not able to do that, (she being detained abroad) he binds himself to give his youngest sister, *Isabel*, within fifteen days after the expiration of the time. n)

In 1495, CHARLES VIII. of *France*, wishing to unite *Britanny* effectually to the crown, resolved to marry the heiress of its last duke Francis, which, partly by means of his success in war, and partly through the influence he had with her chief counsellors, he effected. It is remarkable that both himself and the young dutchess were already betrothed to others; CHARLES to MARGARET, daughter of MAXIMILIAN; and ANN, to MAXIMILIAN himself. Nevertheless, those difficulties were got over: *Margaret* was absolutely sent back; and her portion, which, according to the *treaty*, would have vested in CHARLES several important places in *Artois*, was returned, after she had continued ten years at the court of France for education. (o)

In these examples, (and more are not quoted from their known multiplicity all over Europe,) we see of what importance the marriage of *sovereigns* had grown to be, both as the means of transferring dominion, and the instrument of forming alliances between powers who had many natural causes for variance and hostility. We are bound also to remark upon the unfortunate situation of the Great, who were thus reduced to a dependency upon political contingencies, and deprived of almost all chances of judging for themselves, in a matter the most solemn,

(m) Pierre Ouderguest. ch. 191, ap. Rec. des Traités. i. 36.

(n) Rymer. i. 240.

(o) Commynes. L. 7. Ch. 4.

and the most important, to their happiness or misery; who were absolutely treated like merchandise, and chosen or rejected, as the inclination of interest decided. (*p*)

Stipulations by *Treaty* were made, not only for the celebration, but also for the prevention of particular marriages, when they might be prejudicial to the interests of contracting parties. Thus, in 1355, in consideration of certain advantages, *Anne VI.* count of Savoy, agreed to deliver up *Jane*, the daughter of the duke of *Burgundy*, to John king of France, upon the proviso *that she should never be married to the dauphin of Vienna*, whose neighbourhood, in that case, would have been rendered too powerful for the house of Savoy. (*q*)

With respect to the form of these *Treaties*, there was no general one prescribed; but the parties concerned followed the rules of their municipal constitution, and registered them in their chanceries, or caused them to be ratified by their states, according as the nature of their government directed. It seemed, however, on all hands agreed, that no *Treaty of*

(*p*) What reader but must be indignant at the indelicacy of the following article of a marriage treaty: "Quod cum Margareta ad tempus nubile pervenerit, et Gerardus filius comitis, eam carnaliter cognoverit; dux, de bonis suis assignabit," &c. &c. (Chr. Butkens. Preuves. de Brab. &c. p. 58.)

Or the following, between Philip king of the Romans, and a duke of Brabant, Feb. 9, 1207: "Et si contingat filiam domini regis mori, antequam fiat carnalis conjunctio inter eam et ipsum filium ducis Crabantie; dominus rex loco illius, dabit aliam de filiabus suis, prædicto filio ducis in matrimonio, si quam tunc habuerit liberam et absolutam: si autem contigerit mori filium ducis Brabantie, similiter, ante carnalem conjunctionem, si ipse dux Brabantie tunc aliam filiam habuerit, prædicta filia domini regis, vel alia, si quam habuerit, illi filio ducis Brabantie, matrimonialiter copulabitur." (Chr. Butkens. Preuves des Troph. de Brab. 59.) The true though coarse picture of manners which these *Treaties* set before us, will excuse the length of the note.

(*q*) Hist. General de Sav. Preuves. 188.

*Marriage*

*Marriage* was absolutely binding until the ceremony had taken place, either in person, or *by proxy*; or, as was held by some, till the marriage itself was actually consummated.

As the princes of the world could not visit, nor travel through one another's dominions, with the same ease as private persons, the custom of espousing *by proxy* was fallen upon; by which some person, high in the confidence of the future husband, was sent to the residence of the lady, and went through the ceremony with her at the altar, in the name of his master. Of this we have examples, at least as far back as the eleventh century, when in the year 1067, *Alphonso* king of *Leon*, is said to have married a daughter of William the Conqueror *by proxy*.  
(*r*)

The necessity for consummation was pleaded (and with success) by CHARLES VIII. when he obtained the heiress of Brittany from MAXIMILIAN, who had not only being betrothed to her, but had actually espoused her *by proxy*. It was urged to the dutchess by the agents of Charles, that her marriage had been celebrated without the consent of her liege Lord; "which defect," they said, (though it would not evacuate a marriage after *cohabitation* and *actual consummation*, yet it) was enough to make void a mere *contract*" (*s*) This reasoning was afterwards set forth in a regular *deed*, or *state* memoir, in which it is expressly laid down, that the marriage being "*projetée, mais non consommée, demeura nul.*" (*t*)

MAXIMILIAN on that occasion began a ceremony, which till then had not been generally known. "The marriage," says Lord Bacon, "was consummated *by proxy*, with a ceremony *at that time in*

(*r*) Mod. Un. Hist. 17. 209.

(*s*) Bacon. Hen. VII. 48.

(*t*) Amelot. de la Houffaye. ap Fred. Leonard. l. 418.



“ *these parts new*; for she was not only publicly  
 “ *contracted* but *stated* as a Bride, and solemnly bed-  
 “ ded; and after she was laid, there came in Maxi-  
 “ milian’s ambassador with *letters of procuration*, and,  
 “ in the presence of sundry noble personages, men  
 “ and women, put his leg (stript naked to his knee)  
 “ between the espousal sheets, to the end that that  
 “ ceremony might be thought to amount to a *consum-*  
 “ *mation*.” (u) As Maximilian, however, was al-  
 most in the neighbourhood of his Bride, it got him  
 (and not undeservedly) the reputation of a “ cold  
 wooer,” and at all events was the cause, as we have  
 shewn, of the rupture of his marriage. (v)

As the laws which governed the marriages of the  
 princes of Europe were thus of the utmost conse-  
 quence to the state of their politics, so also must have  
 been the laws which governed the rupture of those  
 marriages; and this, as there was no common court  
 to decide between sovereigns, must have been a mat-  
 ter of considerable nicety. The proceedings, how-  
 ever, upon it, were comparatively regular, and add  
 to the proofs of our point, that the laws of the na-  
 tions of Europe were peculiar to themselves, and  
 dependent upon their particular system.

We have seen in a former chapter (w) that the  
 Pope claimed to himself the jurisdiction of matrimo-  
 nial causes, as falling peculiarly under ecclesiastical  
 law; and it were endless to recite the vast variety  
 of cases in which he took cognizance of *divorces*,  
 either on account of the marriage having been con-  
 tracted within forbidden degrees or from other  
 causes.

(u) Bacon. Hen. VII.

(v) “ They said, (*the friends of Ch. VIII.*) that it was an  
 “ argument that Maximilian was a *widower*, and a *cold wooer*,  
 “ that could content himself to be a bridegroom by *deputy*, and  
 “ would not make a little journey to put all out of question.”—  
 Id. 49.

(w) Chap. XIII.

Towards the middle of the fourteenth century, however, when the empire was declared independent of the Pope, this jurisdiction was shared with him by the Emperor, at least as far as the vassals of the empire were concerned. In the *Codex Diplomaticus* of *Leibnitz*, there is a long and formal *Letter of Divorce*, awarded by LEWIS of BAVARIA, to MARGARET dutchess of *Carinthia*, and JOHN, a son of *Bohemia*, which professes to proceed upon the principles of the *divine law*, as explained by the most approved doctors. The cause for divorce was *impotency*; and the letter recites, that the Emperor had examined the matter with the utmost attention, both of himself, and by his agents, according to the desire of the parties; and discovering that the dutchess was still a virgin, and the defects of her husband natural and incurable, he pronounces (*legi divinæ conformiter, sicuti certum est, et asserunt sacræ scripturæ, five leges divinæ, atque civilis sententiæ sufficientes, ac comprobati doctores*;) that both of them shall for ever be divorced from all bond of matrimony, and be allowed to dispose of themselves, that is, their proper persons, and all their goods, rights, and things, as well moveable as immoveable, as either shall think fit. (x)

The marriage thus annulled, might have united the kingdom of *Bohemia*, and the dutchy of *Carinthia*, under one head: it was prevented by the sentence of divorce; and Margaret immediately afterwards bestowed herself, by virtue of that sentence, upon Lewis, Margrave of Brandenburg. (y) Such then were some of the governing principles of those laws, upon which the state of Sovereignty in Europe, was made in a great measure to depend. (z)

OF

(x) *Leibnitz. Cod. Diplom.* 154.

(y) *Id. Ib.*

(z) Upon the subject of *Divorces*, the reader will recollect the advice given by *Cranmer* to *Hen. VIII.* to consult the Universities

## OF TREATIES OF SALE.

A SECOND instrument of the alienation of dominion, was the regular and obvious one of *Sale*, or *Exchange*, so frequent in the private affairs of the world.

With respect to this however, there were many difficulties, which the municipal constitutions of the different States must have naturally thrown in the way. For though after the institution of property, every man who possessed the soil, might barter his interest therein to another for a valuable consideration; yet that institution could not extend itself over the rights of a free people. The government therefore of a particular person or family, which a free body of men might have erected, could not be transferred at pleasure by that family to another: The consent of the persons to be governed, was necessary before the transfer could regularly take place.

Such Sale or Exchange however might legitimately be affected in States, the constitution of which considered them as the absolute property of the reigning family, and whose subjects were therefore in the nature of serfs, chained to the soil, and with the soil, liable to be sold at will.

The great luminary of the Law of Nations, has carried the rights of particular families over their subject pretty far, in his account of what he calls *patrimonial kingdoms*, which he considers in the light of absolute property. (a) Whether his account of that matter be well or ill founded, it is not here the

verities of Europe, with respect to the *Divorce* which the Pope refused to pronounce. A corroborative proof of the union peculiar to the nations of that quarter of the globe.

(a) Grotius de B. et P. L. 3. ch. 11. 4. Sec. 12. 21.

place to enquire; since however the true spirit of philosophical liberty, may have recalled men from the blind submission which they formerly yielded to the despotism of one man, or one family; it is certain that the fact has sometimes existed; and the Despot therefore who received such submission, enjoyed it, or sold, or bartered it away, like any other property which he possessed.

There are, however, few examples of the sale of the rights of *Sovereignty* in the greater countries of Europe, the Constitutions of which were remarkably free; and they are confined chiefly to those smaller provinces, which in some measure resembled the private estate of the Sovereign.

In 1301 Theodoric Landgrave of Thuringia, sold the Marquisate of Lusatia to Burchard, Archbishop of Magdebourg, for six hundred marks of silver with all its inhabitants.—“*Insuper cum ministerialibus, Vasallis & Mancipiis, et aliis hominibus cujus- cunque conditionis in jam dicta terra commorantibus,*” &c. (b) In the same manner in 1311, *Dantzick, Derschorvia, and Swieca*, were sold by the Margrave of Brandenburg to the Grand Master of the Teutonic Order, for 10,000 marks, “*cum castris, castellis, vellis, Monetis, Teloneis, foris, cum Agris, cultis et incultis, viis et inviis, pascuis, sylvis, nemoribus, lacubis, paludibus, venationibus, piscationibus, borris, melleficiis cum omni utilitate et fructibus.*” (c)

In 1333, the city and territory of Mecklin, were sold by a regular *Treaty of Sale*, between the Bishop of Liege its Sovereign, and the Earl of Flanders, for 100,000 reals of gold and fealty reserved. (d) About the same time, the city and county of Lucques, were sold by John of Luxemburg, king of Bohemia,

(b) Du Mont. i. 330.

(c) Id. i. 365.

(d) Preuves des Troph. de Brab. ap. du Mont. i. 164.



to Philip of Valois, for 180,000 florins; (e) and several years afterwards, the *sovereignty* of Frankenstein, was sold by the Duke of Silesia, to the King of Bohemia for 2000 marks. (f) The possession of Avignon by the Popes, so celebrated formerly, and which lasted till our present days, was originally owing to a similar deed of sale; CLEMENT VI. having *bought it* of JANE Queen of Naples, and Countess of Provence, for 80,000 florins. (g)

The full interest also, which gave men a title to sell their dominions outright, was attended with the consequent title to *mortgage* the temporary enjoyment of them; and this was the case with ROBERT duke of Normandy, whose religious and military ardour for the first *Crusade* being repressed for want of money, (no *newes*, says Speed to his *coffers*) he was induced to mortgage his Dutchy for 6,666 pounds weight of silver, to his brother William, and gave him possession of it before his departure. (h)

The power of selling while in actual possession, conferred at the same time, the right to sell the reversion. In 1479, LEWIS XI. whose eye had been long fixed upon the annexation of Brittany to the crown of France, upon default of male offspring in Francis II. *bought* the rights of the house of Penthièvre, the next male heirs in reversion; (i) and fifteen years later, his successor CHARLES VIII. purchased the *right* to the whole Empire of Constantinople. The famous BAJAZET, had long been in possession of this illustrious remnant of the Roman power; but ANDREW PALEOLOGUS, the nephew of the last Christian Emperor Constantine, was considered by the Christians as the rightful heir to the throne. This prince, who lived in exile in Italy,

(e) Du Puy. Droits du Roi F. C. sur plus. Etats, &c. p. 70.

(f) Du Mont. Corps. Dip. 2. 155.

(g) Leibn. Cod. Dip. 200

(h) Speed. 441.

(i) Garnier. 1. 494.

and knew the chimerical views of the King of France; scrupled not to part with an imaginary title for a real possession. He therefore entered into a regular *Treaty of Sale* with the Cardinal de Gurk, by which he parted with all his right and title to the Imperial crown in favour of CHARLES, upon the following conditions: That the King should assign him an annual pension of 4300 ducats, and an estate in lands, either in France or Italy of 5000; that he should give him the command of one hundred men at arms; use his good offices with the Pope to continue his pension of 8000 ducats; and establish him, “after the conquest of the Empire by Charles, in the despotism of the Morea;” for which he Paleologus, was to send him annually to Constantinople a white horse by way of homage. (k) This Convention was drawn up by two Notaries, and ratified by the King, who in consequence of this purchase, appeared at his Coronation at Naples, cloathed in the ornaments of the Imperial dignity, and made no scruple of professing his design to proceed against Constantinople, fortified with the double title, with which the common rights of Christians against Turks, and the purchased rights of Paleologus, would thus invest him. (l) The whole purchase and the consequent conduct of Charles, are instances of the Law of Nations, singularly operated upon, by *Treaty and Convention*.

To this head (on account of the similarity of the principle which governed it,) I might also refer the custom of alienating dominion and sovereignty, by BEQUEST, and by actual DEED of Gift. Instances of the first must be frequent in the reader’s recollection, and the same power which could dispose of the whole Sovereignty, had almost of course the right of altering the succession. Thus CHARLES II. king of Sicily, and Count of Provence, in 1308, ordain-

(k) Garnier. 2. 429.

(l) Id. 462.

ed by will, that the male heir, though farther removed, should succeed to the County, before the female, though nearer to the common stock. (m) Adoptions also, which sometimes conferred very important rights, and gave birth to considerable revolutions, took their origin from the same source. The claims of CHARLES VIII. upon Naples in the fifteenth century, and the celebrated invasion of that country in consequence of them, were ultimately founded upon the *Adoption* of Lewis, Duke of Anjou, by JANE I. Queen of Naples, in 1380; and the rights conferred by this adoption were, as might be supposed, laid before all Europe by a solemn and public *Deed*. (n)

Of *Deeds of Gift*, there is a remarkable case in the history of *Dauphiny*. That province had become an independent State in the confusions which took place after Charlemagne. In consequence of the then allowed rights to create Kings, the Emperor, LEWIS V. in the fourteenth century, created the Dauphin *Humbert, King of the kingdom of Vienna*; to which he added the singular privilege of disposing of his sovereignty at will, whether during life, or after his death. It was by virtue of this constitution, according to the writers on the *Droit Public*, that Humbert, in 1343, ceded his dominions to Philip of VALOIS; by a solemn *Deed of Gift*. (o) By a similar *Deed*, and upon a like principle, the Emperor Henry VI. had invested Richard I. of England, with the ancient kingdom of Arles; and Baldwin, Emperor of the East, imitating this illustrious prerogative, con-

(m) Leibnitz. *Cod. Dip.* 58.

(n) See Leibnitz. 237.

(o) Pfeffel. *Droit. pub. d'Allemagne*. i. 541. Henault. *Hist. Chron.* i. 315. there were three Treaties concerning this transaction; one in 1343; one in 1344; and the final one in 1349. Humbert retired into a Convent. The *Deeds* are in Leibnitz. *Cod. Dip.* 158.



ferred upon the Duke of Burgundy, in 1265, the kingdom of Thessalonica. (*p*)

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## OF TREATIES OF PROTECTION.

IT was also by *Treaties* and positive *Conventions*, that particular states vested in others, certain high powers, which gave them considerable privileges with respect to the parts they were to act among other States, though it did not altogether destroy their own Independence, or take from them the possession of their internal government. This was what was called an UNEQUAL ALLIANCE, by which a smaller State often parted with the height of its Sovereignty, to some one more powerful, in exchange for the protection and consequence which it might derive from the name and strength of the other. In this case, the greater State took upon itself the charge of defending the smaller, and acquired in return a right of interference in its political affairs, and hence another *legitimate* cause for action upon the theatre of Europe. Of this we have an example, in the short, but clear and precise terms of the convention between John, King of England, and the King of Man, in 1205, preserved in Rymer. It runs thus; “ Rex, &c. omnibus, &c. Sciatis, quod  
 “ suscepimus dilectum consanguineum nostrum, Reginaldum regem Manniæ, in custodiam, protectionem, et defensionem nostram, et omnes terras, et

(*p*) He conferred it “ considerant et veant le bien, l’oner, le profit, et l’avanceme ut qu nos peut venir en l’Empire de Romanie, dou noble Baron Hugue duc de Bourgoigne.” Perard. Rec. des pieces curieuses. serv. à l’Hist. de Bourg. 508. For other cases see Du Mont. i. 288, 337, 362. Recueil des Traitez. i. 171, 185, 430, 583, &c. Leibnitz. 220, 382.

“ homines



manifesto and memorial had now grown pretty universal, and the treaties that were made, were *matters of record*; these treaties of *Renunciation*, and the publication of them to all the world, became, it was supposed, a sufficient deposit of future arrangements. They were thus preserved, as it were, in the *Chancery* of Europe, (u) and the various nations looked to them, as to one of the bases of their political conduct, and the guide of their legitimate claims. The security it must be owned, was not of the strongest, and *power* did not fail to break it down but too frequently. It was however the only one which the independence of States could admit of; whenever justice prevailed over strength, it was of sufficient force; and wherever it failed, the power of the most regular tribunal would possibly not long have resisted.

In the proceedings concerning the succession of France and Navarre in the fourteenth century; we have a full example of *Renunciation*. In the year 1316 Lewis X. King of France and Navarre died, leaving but one child, the Princess Jane. The constitution of Navarre vested the kingdom immediately in JANE; but the succession of France was disputed by the next male heir PHILIP V. At that time the Salic law concerning the succession, was not so well understood, and the Duke of Burgundy, the guardian and next of kin to the Princess, raised a considerable party against PHILIP, in which he was joined by the latter's own brother, the Count de la Marche. The matter was composed by treaty, a valuable consideration was paid to JANE for the rights which she *might* possess over the kingdom of

(u) The common address of these Treaties was, *Omnibus Christi fidelibus, &c.* or *ad universitatis vestræ notitiam volumus pervenire quod, &c.* or, *noverit Universitas vestra.* Rymer. Du Mont. & Leibnitz. *passim.*

France, and which she confessedly had to the kingdom of Navarre, and a regular and solemn *renunciation* of all those rights, was made in her name by the Duke of Burgundy. (*v*) This treaty only extending to Philip and his issue, and that Prince dying without children, a similar one, attended with a similar *renunciation*, was made between Charles IV. and the same Duke. (*w*)

But one of the most important instances of this sort of custom that occurs in the earlier ages, is to be found in the twelfth article of the TREATY of BRETAGNY, which ended the long wars of Edward III. in support of his claim upon France. By that article it was agreed, that two mutual *renunciations* should be made by the families of France and England. King John and his eldest son, were to *renounce* for ever, all claim to jurisdiction and Sovereignty as Lords Paramount, over all the places ceded by the treaty to Edward; who, in like manner, with the Prince of Wales, was to renounce on his part all rights and title to the crown of France. (*x*) These conditions were duly executed by the King of France, who sent a formal *Deed of Renunciation* to Bruges, in conformity to his agreement; though, according to the French historians, his example was not followed by Edward (*y*)

## OF TREATIES OF CONFEDERATION.

IN the last place, *Treaties* produced a change among the sovereignties of Europe, in consequence

(*v*) Tresor des Chartres ap. Velly. 4. 315. Leibnitz. Cod. Dipl. 70.

(*w*) Preuves de l'Hist. d'Evreux. ap eund. 386.

(*x*) Rym. 6. 179.

(*y*) Actes M. S. de l'exec. du Tr. de Bret. Villaret. 1. 234.

of the various federal alliances, of which they were the immediate, and indeed the sole instrument.

It was through their means, that the nations of the world were made to understand *in form*, that a new State was introduced among them; and therefore that the members which had coalesced in the alliance, were henceforward to be viewed under a new relation. In this manner therefore a number of small Communities, or Provinces, *being, each of them, Sovereign within themselves*, might unite their Sovereignties, and become one power; and the Confederation thus formed, might through the same instrument, receive within its pale, any other Communities which chose to join it. Even private individuals, (could we suppose any number of them to be found who had not yet entered into society,) might thus by *Convention*, form a body politic; and as it was by the means of *Treaties among one another*, that these leagues were first effected; so also, it was by *Treaties with other States*, that their union was acknowledged to be legitimate.

Of all this we have examples in the ages before us; the most illustrious of which are the confederation of the GERMAN STATES, of the SWISS CANTONS, and of what was called the TEUTONIC HANSE.

It is very true that the first of these, had been for a long time one integral nation, (if I may so term it,) the Sovereignty of which was possessed *undivided* by the King of Germany, who was at the same time by *election* Emperor of the Romans. But it is well known that by degrees, it split into a vast variety of States, all of them sovereign within themselves, though united in one great *Confederation*, with an *elected King* for their head. The basis of this Confederation, is a PUBLIC DEED, known by the name of the GOLDEN BULL; which fixed the exact rights of the different component States, and announced to all  
the

the world, the places they were to hold in Europe. From that Deed therefore, explained and enlarged also by numberless important *Treaties*, the *integral* authority of the first kings was known to be divided among a number of inferior Sovereignities, which all other States were accordingly bound to acknowledge as such, unless they had other particular causes for denying it.

In the same manner it was, that the SWISS CONFEDERATION arose; which however, as is well known, was rather an *Alliance of Confederations*, than one general coalition of all the Helvetic States. One of the earliest instruments of union that was entered into by this celebrated and interesting people, (1315) purports to be an alliance almost between the individuals themselves of the contracting Cantons; the Deed running (though collectively) in the name of the *Peasants* only. “A cette cause,” says the record, “Nous les Payfans d’Ury, de Schwitz & d’Unterwalden, faisons a sçavoir,” &c. (z) In the next alliance, which was with the Canton of Lucerne, by the three Cantons already united, (1332) the style is preserved; and the Deed purports still to be made by the Peasants above mentioned, though Lucerne assumes the dignity of a *State*, under the name of *Advoyer, Conseillers & Bourgeois*. (a) In a third Deed, which took in Zurich, (1351) the three original Cantons quit the appellation of *Peasants*, and appear as one *State* in conjunction with Lucerne, under the common government of Advoyer, Conseil, et Bourgeois. (b) In a fourth alliance, with Berne, (1353) in which the three first Cantons stand alone, (the State of Lucerne not entering into it,) they return to their original character of *Payfans*. (c)

It

(z) Leibnitz. Codex. Dipl. 69.

(a) Id. 141.

(b) Id. 189.

(c) Au nom de Dieu Amen Nous l’Advoyer et les Bourgeois de la ville de Berne en desert, et les Amans et *Payfans* d’Uri, &c.  
sçavoir



It is needless to point out to the reader, that it was through the operation of these Treaties, that the Swiss Peasantry erected themselves into independent States; and that from the Treaties which were afterwards made with them by other powers, their Sovereignty came ultimately to be acknowledged.

But the most remarkable example of a new and powerful State, arising out of the federation of a number of smaller communities by *Treaty*, is to be discovered in the famous Alliance called the HANSEATIC LEAGUE.

The nature of this celebrated Union, developes principles which were unknown before in Europe, and probably in the world; and the whole of its Constitution discovers to us a refinement which was attended with such important consequences, that it is wonderful that Sovereigns could have suffered it to exist.

The association was, if I may so call it, *artificial*. It exercised the rights of Sovereignty, and for a long time took its rank among the States of the world, though composed of members, which were so far from being independent themselves, as actually to form subordinate parts of other Empires. A few of the cities were indeed free and Imperial; but Hamburgh itself, the richest and most important of them all, had been entirely dependent upon the duchy of Holstein; and even long after it had *bought* its liberty of Denmark in 1225, it was allowed no seat in the *Diet*, and of course could not be considered as a State of the Empire. (*d*)

This well known League was originally formed for mere commercial purposes; (*e*) and the immedi-

sevoir saifans, &c. (Id. 196) For a summary of the Swiss Alliances see Heiss. 2. ch. 27.

(*d*) Pfeffel. Droit. pub. d'Allemagne, i. 378.

(*e*) See the account of the various privileges granted to them by different Sovereigns. Werdenhagen. De Rep. Hans. c. 15.

ate object which brought them together, was the defence of their trade from the Pirates that infested the Baltic. The accomplishment of this important end, and the long succession of wise measures which were afterwards pursued, contributed so evidently to their prosperity, that they received almost daily accessions to their alliance in all the principal trading cities of Europe. Exclusive of the cities of HAMBURGH, LUBEC, and BREMEN, (which as they were the founders, so they are now the only remnant of this famous Association,) Places the most remote, and the most important, in various countries of Europe, joined interest with, and were received among them. Eighty of the most powerful cities of Germany, formed the basis of the alliance; France furnished it with Rouen, St. Malo, Bourdeaux, Bayonne, and Marseilles: Spain, with Barcelona, Seville, and Cadiz; the Low Countries, with Antwerp, Dort, Amsterdam, Bruges, Rotterdam, Ostend and Dunkirk: Italy, with Leghorn, Messina, and Naples; Portugal, with Lisbon; and England, with London. (f) Thus, the most opulent of the Union, were singly under the controul of various powerful Sovereigns, though taken collectively, they formed an extensive and independent State.

A power so immense as this Confederation could have supplied, would have been by far the most formidable maritime force which the world had known: had not the rights of others, so evidently interfere with almost every one of its *individual* members. Notwithstanding this however, and the definition of it that has been given by the author of the *Coutumes de la Mer*, (which confines it to a mere "participation of privileges, granted by several Kings and States;" (g) it carried its views far beyond the

(f) Heiss. Hist. de l'Empire, 2. 343.

(g) Coutumes de la Mer. 180.

bounds of *Commerce*, and flourished as a *Sovereign Power*, or at least *exercised Sovereign Rights*, till the middle of the fifteenth century, with considerable strength and vigour.

From what has been stated concerning the *dependency* of the component parts of this Alliance, and the annihilation to which it was almost momentarily subject, according as the policy, or even the caprice of other Sovereigns might determine; it may appear inaccurate to have mentioned this Confederation as a *State*. It has indeed been asserted in form, by an author of the last century, that it was merely such an Alliance, as many Commercial Companies have exhibited since; that it never constituted a *Republic*, or *State*; and could only be considered as a *Society of Merchants*, not of *Sovereigns*; (*h*) as a proof of which, if the Treaties they have made with France, and England, are examined, they will be found, he observes, to relate solely to the confirmation and renewal of certain privileges and immunities. (*i*)

This is the opinion of *Abraham Wicquefort*, and the purpose of his assertions, and his reasoning, is to shew, that not being Sovereigns, they had no right to send Ambassadors. The case which gave occasion to his enquiry, was simply, whether the words *Ambassador Deputies*, which described some of their agents in their credentials, gave them absolutely the

(*h*) Pour dire ce qui en est, la Hase Teutonique n'a jamais fait un *Etat*, ni une *Republique*;—ne pouvoit être considéré que comme une Société de *Marchands*; ou tout au plus que comme les Compagnies qui se sont formées pour les deux Indes dans les Provinces Unies.—Étant composée de villes, qui étoient la plupart *municipales*, et qui n'avoient point de marques de *Souveraineté* du tout, mais dependoient de Princes qui les gouvernoient comme leurs autres Sujets; elles ne pouvoient faire entre elles qu'une Société de *Marchands*, et non une Alliance de *Souverain à Souverain*.

Wicquefort de l'Ambassad. L. 1. S. 2.

(*i*) Wicquefort de l'Ambassad. Ib.

character

character of *Ambassadors*; and it was determined by the Court of France, where the question arose, (1645) that they did not. It does not however apply to the point in question, and I have mentioned it merely in order that we may examine a little, this position of *Wicquefort*.

We have already mentioned, that the Constitution of the Hanseatic League was a remarkable one. It was so much so, that were it abstracted from a number of strong facts in their history, we should not hesitate to agree with *Wicquefort*. Those facts however, so completely, and so frequently denounce the actions of Sovereigns; and passed off so entirely without contestation upon that ground; that a very cursory view of them must oblige us to admit, that if they actually were not Sovereigns, they were at least in the daily exercise of *all* the *rights* of *Sovereignty*.

In 1361, war breaking out between Sweden and Denmark; WALDEMAR III. king of the latter country, made a descent in the Island of Gothland, and plundered the rich city of Wisbuy. As some of the Hanse Merchants were involved in the ruin, (as it should seem without redress,) the *League* in revenge, *confiscated* all the ships and effects of the Danes, that were within their ports, and declared war *in form* upon the King. (*k*) Into this war they drew by *alliance*, the King of Norway, the Dukes of Mecklenburgh and Holstein, and several other Princes. And after various success, and a short peace, the war broke out again; and was resolved upon, after a solemn deliberation held

(*k*) Commovit ea *Gothlandiæ* devastatio omnes Germaniæ Civitates, præsertim illas septuaginta Capitales, quæ, missis legatis, hostilia VALDEMARO, ob direpte eorum insigne Emporium *Vybyense*, nuntiabant.

Olaus Mag. Lib. 18. p. 691.



by the deputies of eighty of the cities, who met in Congress for that purpose in Cologne. (l) In consequence of this, they equipped a formidable fleet, which sailed straight to Copenhagen, and obliged the King to make a peace, and yield to them the island of Schonen for sixteen years, by way of reimbursement. (m) The Treaty was sworn to, and guaranteed by a number of Princes. (n)

In the fifteenth century, we see them engaged in much more important, though less successful operations; in which the rules of their conduct seems to have been founded, not so much upon *commercial*, as *political* principles.

The Kings of Denmark, had long been the *Despots* of the *North*, and the great bulwark between them and the Vandalian cities, (as the Teutonic Hanse were sometimes called) was the Dutchy of Holstein. ERIC of Denmark, having nearly overwhelmed the Princes of that Country, the City of Hamburgh represented to the League, the importance of opposing his progress, and the necessity of holding the balance between them. In consequence of this the allied themselves with Holstein, but first sent deputies to ERIC, who in the name of all the Hanse, exhorted him to peace; which being refused, they once more exercised the sovereign right of declaring war. (o)

In the course of this war, they sent a fleet against Denmark, composed of more than two hundred ships, having twelve thousand land forces on board; (p) and the Emperor, who was the ally of Eric, having it in his power to put them under the Ban of the Empire; they published a manifesto setting forth that they had *declared war* in defence of their rights and liberties.

(l) Mod. Un. Hist. 29. 102.

(m) Heifs. 2. 343.

(o) Mod. Un. Hist. 244.

(n) Mod. Un. Hist. 29. 203.

(p) Heifs. 2. 343.

Hostilities, were at length put an end to, after having lasted nine years; and the peace was agreed upon in a regular Congress, at which the Deputies of the Hanse attended, as the Allies of Holstein. (q)

Now I own, that in these operations, I can see nothing but the conduct of the most regular Sovereign Power; and there is no alternative but to pronounce the Hanseatic League to have been either Sovereigns or Freebooters. The manner in which they conducted themselves, however, is decidedly in favour of the first; since Declarations of war; Treaties of Peace; Manifestoes; Alliances with Princes, and the Guaranty of legitimate Sovereigns, can hardly be entered into, except by those who are legitimate Sovereigns themselves.

There were many other transactions, of a nature indeed not so decided, but which all of them in like manner take their rise from a supposed Sovereignty in the league; and by the fifteenth and twenty-first articles of the ordinances agreed upon in their assembly held at Lubec in 1418, they exercise the power of corporal punishment, of imprisonment, and even of life and death. (r)

Thus much then for the more prominent acts of Sovereignty exercised by the Hanse. But if we also inspect the Treaties alluded to by Wicquefort himself, we shall find the style of them very different from the style of subordinate contracts, or *mere char-*

(q) Mod. Un. Hist. 29. 148. 155.

(r) "Nemo arma, vela, aut instrumenta bellica, &c. piratis, prædonibus, homicidis, et talibus malitiosis vendito, *sub pœna vite.*" Leibnitz Cod. Diplom. 313. If any of a ship's crew also refused, when in distress, to assist in preserving the cargo, so that it came to be damaged through their negligence,

*Tunc nebulones captivi et in carcerem adduci debent, in quacunq; civitate illi deprehendi poterunt; atque tunc per integros quatuordecim dies, non aliter quam aqua et sub pane saturentur; saltem ad necessitatem vitæ sustentando, ut in honestate fidelitas eo rectius conservetur.* (Ibid.)

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ters, which must have been used, had they been simply, as he supposes, a Guild, or Fraternity, (and nothing more) stipulating for commercial privileges.

In the first place, though the immediate subject matter of the Treaties is, as we may naturally imagine, concerning commerce, yet the language of the contracting parties is that of Sovereigns. The characters of the agents on both sides who made the Treaties, are described in terms exactly similar; and the powers with which they were invested, relate to things in which Sovereigns alone are allowed to interfere; in addition to which, the very titles of the deeds import them to be, what none but Sovereigns can have the power to make, namely, *Treaties of Peace*.

As a proof of this, we need only set forth the language of the *Treaty of Utrecht*, made between *Edward IV.* and the *League*, Feb. 29, 1474.

It is called a *Treaty of Peace* between the King of *England* and the *Hanse Towns*, (s) and the Plenipotentiaries who made it are thus described: W. Hatteclisse, &c. Joannes Ruffel, &c. W. Rosse, &c. Oratores, Commissarii, Procuratores, Nuncii, et Deputati nostri, in civitate Trajectensi comparuissent; tuncque et ibidem, cum spectabilibus et circumspicuis viris, Domino, &c. &c. &c. Communitatum, Civitatum, et Oppidorum, Hanse Teutonicæ, Oratoribus, Nunciis, Procuratoribus, una cum aliis sibi adjunctis, particularium civitatum, &c. Oratoribus, infra nominatis, &c.

Now upon this we may observe, that the only difference between the titles of the agents of *Edward*, and those of the *League*, is the addition to the former, of *Commissarii* & *Deputati*, which are of little consequence: for it is well known to all those who have looked into antient Treaties, and the Creden-

(s) Aitzema. Aff. d'état et de guerre. 4. 389.

tials of Ambassadors, that the word ORATOR was in old times the descriptive title of the agents of Sovereigns in the exercise of their functions. (t)

The Deed goes on to say, that these *Oratores* had met on both sides to deliberate, de modis, viis, ac formis, quibus differentiæ, lites, guerræ, injuriæ, et discordiæ, inter homines partium prædictarum, motæ & pendentes, finaliter pacificari, &c. possent.

That, in consequence of this, inspirante pacis auctore, pro pacificandis et abolendis differentiis, litibus, guerris, &c. &c.

Atque pro reducendo, et restituendo, omnes et singulos homines utriusque partis prædictæ, ad pristinam amicabilem, et mutuam communicationem, et conversationem; liberumque intercessum, mercandifandi, &c. they had agreed upon a certain Convention, vice, auctoritate, et nominibus superiorum, pro se suisque successoribus et subditis, universis, &c. &c. (v)

This is a language, so clearly that of the agents of *Sovereign Powers*, that if it is allowed (and it has never been denied) that the Hanse Towns had a right to make use of it, I cannot conceive it commonly consistent to deny their *Sovereignty* at the same time. The legitimate mention of *wars*, *injuries*, and *discord*; of the *inspiration* of *Heaven*, as prompting them to peace; and of *successors* and *subjects*, who were to be bound by the Treaty they were going to make; are all proofs of the point too strong to need any farther comment.

Such, then, is a very short view of this celebrated Association, under a light in which it has often been considered, and which bespeaks the utmost refinement in those Conventions which permitted such a Sovereignty to exist; for it is certainly no incurious

(t) Vide Coke. 4th Institute. 153.

(v) Vide ut sup.

part of the history of the European nations, to observe them acknowledging for so long a time an *artificial* state, composed of materials which almost all of them *lent*, as it were, towards its formation; which they had the power of withdrawing at pleasure; and which, like an enchantment, was actually annihilated as soon as they chose to break the charm. To this they were at last driven by the increasing power of the union, which induced them, after their famous war with *Eric of Denmark*, to withdraw their respective merchants, and the alliance instantly crumbled to-pieces. From that time, none but the *German cities* were allowed a place in the Confederation; and they being continually reduced, as various Sovereigns got the better of them, it has dwindled to the three towns, formerly mentioned, (*w*) which are perhaps more powerful, from their individual consequence, than from any support they may derive from a union, which is now "*the presentation of but what it was.*"

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## OF AUXILIARY TREATIES.

Another great point in which Treaties and positive Conventions influenced the Law of Nations, and contributed to separate it still farther from the law of nature, was the power which it vested in nations of doing certain acts of a hostile nature, but which were not therefore to place them in the situation of a declared enemy.

According to natural principles, it should seem, that whoever assists an enemy, let what will be his

(*w*) Pffefel. droit pub. d'Allemagne. i. 443. 445. Putter. 3. ch. 1.

previous connection with him, becomes instant an enemy also, and may therefore be pursued as such wherever he appears. According to modern doctrines, however, in consequence of the multiplication of the ties between all the States of Europe, by means of *Treaties*; it is allowable for a nation to be the enemy of another to a certain point, and no farther: and if, *previous* to the breaking out of war between two kingdoms, a defensive *Treaty* has been made between one of them and a third, by which a certain number of troops is to be mutually afforded, the compliance with the agreement implicates the *Auxiliary* in the quarrel, only so far as the contingent which he furnishes is concerned. (x)

Traces of this refinement, and the manner in which it was by degrees introduced by *Convention*, are to be discovered very plainly in the ages before us, particularly in the Treaty between JOHN and PHILIP, Kings of England and France in 1214; in which their conduct with respect to the rival Kings of Sicily and Germany, FREDERICK and OTHO, was laid down in precise terms. PHILIP was the ally of FREDERICK, and JOHN of OTHO; and France and England agreed to make peace, without tying themselves down to abandon their allies; so that it was possible for each to remain at war in a certain *territory*, as *Auxiliaries*, though the two countries respectively continued at peace at home. The following article acknowledges it in language the most express:

“ Fredericus rex Romanorum et Siciliæ, erit in nostra treuga si voluerit, et rex Otho similiter, erit in treuga regis Angliæ, si voluerit; et si alter illorum noluerit esse in treuga, nos poterimus juvare Fredericum in Imperio; et rex Angliæ Othonem in Imperio similiter; absque messacere, et absque faciendo

(x) See Vattel L. 3. S. 101.



guerram inter Joannem regem Angliæ et nos, de tēris nostris." (y)

In like manner, towards the end of the same century, when the most determined war prevailed between Arragon and Rome, in which Naples was the chief support of the latter; it was stipulated by the Treaty of *Oleron*, which was to give peace to Sicily and Naples, that JAMES, King of the former country, should be allowed, notwithstanding that peace, to assist his brother the King of Arragon *in whatever war he undertook*. (z)

In like manner, also, after the Treaty of Bretigny, between JOHN of France, and EDWARD III. of England, Henry de Transmare being raised up by JOHN to balance the interest of England with his brother the King of Castile, he was bound by *Treaty* to serve the King of France "envers et contre tous;" for which he had a pension of ten thousand livres, and a promise of an honourable retreat, in case he failed in his enterprises. (a) But as the name of England did not appear in the Treaty, it could not declare war against France, and both countries engaged in the war of Castile as Auxiliaries, without interrupting their amicable intercourse at home. The soldiers of France fought the battles of Henry, and the power of England was led by the BLACK PRINCE to the assistance of PETER; and each nation again encountered one another in Spain, though, in conformity to the rules of the world, in other parts they remained at peace. (b)

Mankind had made a considerable advance in the diplomatic science, when such refinements were held legitimate. The Romans pursued a very different conduct, and much nearer to the law of nature, in

(y) Rym. 1. 112. Leibnitz. Cod. Dip. p. 9.

(z) Burign. 2. 220.

(a) Tresor. des Chartres. ap. Villaret. 1. 272.

(b) See the reasoning before-mentioned in the case of the Marechal D'Andregham, Chap. XIV.

considering every ally of an enemy as an enemy himself. Other nations thought so too; and the total destruction of their city by BRENNUS, was the well-known consequence of the assistance they gave to the enemy of the Gauls.

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## OF TREATIES OF SUBSIDY.

Not unfimilar to these Alliances, were the *Treaties of Subsidy*, so frequently to be met with all through the history of Europe, and which have grown to be so important a part of the Jus Publicum in modern times.

The invention of money, among other revolutions which it caused in the affairs of mankind, brought about that great one, of investing those who possessed it, with a potent and manageable instrument of raising a power which they could not well have commanded, if left to mere natural resources. Money, therefore, has not been improperly called *power* itself; and the character of it, as one of the finews of war, is well known. By a proper employment of this great engine, the states of the world contrived to multiply their forces, and had always at command a certain body of troops entertained for them by other nations, without thereby involving the whole force of those nations in their general quarrels.

In the application, however, of this doctrine, regard was of course had to the various other institutions which at that time governed the world; and as the Feudal System, while it in general allowed the rights of peace and war to all great vassals, absolutely forbade the exercise of them towards the Lord Paramount; we find, that in making these Treaties of Subsidy, exceptions were constantly introduced in

favour of those who might possess superior rights over the parties.

This recourse to subsidy appears early in the history of Europe. So far back as 1101, we have a long and regular Treaty of this sort between HENRY I. of England, and the Earl of Flanders; by which, in consideration of four hundred marks a year, the Earl is bound to assist the King with five hundred soldiers, against all enemies who may attack him in England, except his liege Lord the King of France. (c) A century afterwards, another Treaty is made to the same effect, between King JOHN and the Earl of HOLLAND; the soldiers to be in the pay of the King while within the realm: (d) and in 1295, we find a Treaty of Subsidy and Alliance between PHILIP LE BEL, and the same state; by which, in consideration of 25,000 livres paid down, and 4000 a year for life, the Earl promises to assist him in all his wars, "except an offensive one against his liege Lord the King of Germany;" to receive his troops within his territories at pleasure; and to make war against all his enemies, "being the Allies of the King of England," particularly those "qui ont recu ses deniers contre le dict Roy de France." (e)

When EDWARD III. and PHILIP of Valois, were preparing for their great contest in France; they each of them sought allies to themselves by every possible means; and a hundred thousand marks purchased a powerful Auxiliary to the former, in the person of ADOLPHUS of Nassau. (f) King CHARLES V. of France, surnamed the Wise, is also represented by an historian, as eager to gain foreign Princes on all occasions to his interests, by caresses and pensions, for which they were to furnish him with a certain number of men; and the *Tresor des Chartres*

(c) Rym. I. 1, 2.

(e) Leibnitz. Cod. Dipl. 34.

(d) Id. I. 168.

(f) Rym. 3.



is full of *Deeds*, by which he obtained the services of soldiers of all ranks, from Sovereigns down to simple knights, drawn from the frontiers of Flanders, and Brabant, from the Rhine, and the interior of Germany. (g)

The military spirit of the age, assisted by CHIVALRY, which taught men to offer their services wherever they were most wanted, contributed without doubt to the universality in which this custom was established; and Europe saw every where vast bodies of men in arms, who, if they had no quarrel of their own upon their hands, were ready at the call of those who had. To *subsidize* therefore, as it was an obvious, so it soon became a general practice; and one part of a nation might *legitimately* be lent to the assistance of another state, without bringing down upon the whole, the hostilities of those against whom it was directed.

It was hence that the character of a soldier of fortune arose, a description of men very antiently known in Europe. It appeared under various shapes, and almost at all times; under the name of *Rowters* in the twelfth and thirteenth, and under that of the *Companies* in the fourteenth century. (h) In *Italy* they were known by the appellation of *Condottieri*, or Leaders of Bands; who made a trade of war, trained up soldiers in *their own pay*, and let them and themselves out for hire, to every state, and to every cause, that stood in need of them. (i)

Finally, the Treaties of Subsidy which were formed by several powers, particularly France, with the Swiss Cantons, are strong instances of this refinement in the Law of Nations. By those Treaties, the best troops of Switzerland have been vigorously employed against particular states, without their con-

(g) Villaret. 2. 8.

(h) Speed 490.

(i) Robertson. Ch. v. 1. 160.



ceiving, on that account, that they had a legitimate cause for quarrel against the community which furnished them. LEWIS XI. is said to have been the first who began to subsidize the Swifs upon a system. He found that they could be redoubtable enemies; and, taking advantage of this custom, (which thus allowed of a partial employment of their forces, without on that account endangering the whole,) he converted them, by means of subsidy, into the most serviceable of his friends. (k)

The *advantage* of granting subsidies to foreign troops, for fighting battles in which they are no wise concerned, it is rather the object of politics, than of the Law of Nations to settle: but its *propriety* upon moral and *Christian* principles, it would not be improper to discuss. As this work, however, is more an historical deduction of what *was*, than a dissertation on what ought to be, I shall not here go into the question. At the same time the subject itself demands the mention of several celebrated bands of these soldiers of fortune, whose actions were attended with many remarkable and melancholy effects upon the affairs and the jurisprudence of the world, and will serve to shew very powerfully the evils to which they are liable, whenever the general order of things is deranged.

In the begining of the fourteenth century, the perpetual wars of Sicily had overwhelmed that fine island with troops of all nations. Most of these, it should appear, were *Mercenaries*, who, consulting the genius of their order, and influenced by the barbarity of the times, refused to lay down their arms after their employers had made peace, and continued a way of life which was no longer lawful. (l)

FRES

(k) Garnier. 1. 491. Recueil des Traitez. 1. 599.

(l) Porro Sicilia tot bellorum motibus libera, in militum, *Capitalanorum*, Arragonensium, Calabrorum, et Siculorum, rapinas

FREDERICK, King of Sicily, was at a loss how to disband them; and, as the only means of delivering the island, he sent them, to the amount of eighteen thousand, as *Auxiliaries* to ANDRONICUS, Emperor of Constantinople, against the Turks. Their Commander, Roger de Flor, acquired the great duchy of Romania, and performed signal services for the Emperor. In the course of five years, however, they turned against their new employer, and fought and defeated his son Michael, in a pitched battle. They afterwards entered into the service of the Count of VALOIS, who pretended to the throne of Constantinople; and afterwards again, into that of WALTER de BRIENNE, Duke of Athens. Quarrelling with this latter Sovereign, as they had done before with the Emperor, they fought and killed him, and even took possession of his country, which they formed into a *state* for themselves, under the title of the GREAT COMPANY. They preserved their full independence till the year 1326, (four and twenty years after their departure from Sicily,) when they put themselves under the protection of their old employer, King Frederick; (*m*) and, under his Viceroy, they existed for years as an *acknowledged* state, till they were lost amid various other revolutions. We have thus the picture of a body of men, collected at first by legitimate commissions, disposing of themselves by *Treaty*, in virtue of a kind of *bastard* Sovereignty, till they at length actually became Sovereigns themselves. (*n*)

et depredationes incidit. Quos Fredericus ut Insulum expurgaret, contra Turcas qui Constantinopolim infestabant auxiliares misit. Fazellus de rebus Siculis. 477.

(*m*) Burigny. 2. 245. 6. 7.

(*n*) It is hardly necessary to observe, that this is a very different case from that frequent one of an ally (*being already a Sovereign Power*) called into the assistance, and becoming the destruction of a weaker State.

Similar

Similar to this, but attended with more various, and, to us, more interesting circumstances, is the history of those famous Mercenaries in the middle of the same century, known by the name of the COMPANIES.

The quarrel for the crown of France between EDWARD III. and PHILIP of Valois, had thrown the whole world into arms; and the great length of time during which that quarrel lasted, brought immense bodies of soldiers from all nations into the kingdom which was the object of contention. The military spirit expanded itself still more than it was naturally inclined to do, and the profession of a soldier seemed literally to have annihilated all others. When therefore by the treaty of Bretigny, 1360, a general peace was agreed upon between the rival powers, there remained all over the seat of war a vast multitude of armed bands, whose ravages had hitherto been authorised by the sanction of Sovereigns, but who could now no longer continue their mode of life, without incurring the vengeance of the law. It was not, however, for such men to understand how the same conduct could be morally different, because they were in different situations; and that what at one moment had been their duty, should of a sudden have become a crime. When therefore the two governments had disbanded their several powers, without taking the precaution of providing them a retreat, or pointing out to them the means of honourable industry, they were led, not unnaturally, to continue the only profession which they had probably known: and as the cause they had engaged in, was indifferent to the greater number of them, a change in their appellations was the only point that distinguished them in their new characters. Their occupations continued almost exactly the same; but the name of Soldier, was degraded into that of Robber.

According



According, therefore, as they were disbanded, they formed themselves into COMPANIES, and electing some of the boldest of their body as their Chiefs, they fell upon every thing that came in their way, with a rage that was so much the more violent, as it was removed from all the restraint under which they had formerly lived. Not only private houses, but cities; not only the highways, but whole provinces, were ravaged by these merciless men; and the distinctions of sex, of age, and even of friend and enemy, were all confounded. (c)

Their numbers and actions made them respected, as well as dreaded; they formed enterprises superior to the force of many regular states; and in the end, as we shall observe, they acquired nearly as much consequence, by forcing *Sovereigns* to treat with, and in some measure therefore to acknowledge them.

At first the King of France considered them, as he had a right to do, as rebels and freebooters. They were not authorised by any Sovereign Power; they made war under no commission but their own swords; and hence they have been called by an old historian, "*Filii Belial, Guerratores de variis nationibus, non habentes titulum.*" (p)

Success, however, obliging the King to pursue a different plan: one of their armies, mustering sixteen thousand strong, encountered JAMES de BOURBON, a Prince of the Blood of the first accomplishments, attended by the flower of the French CHIVALRY, and defeated and killed him at *Brignais*, near the banks of the *Rhone*. They afterwards pillaged the whole of the *Lyonnois*, and other provinces; and marching straight to *Avignon*, resolved to plunder the whole Consistory, together with the

(c) Froiss. V. 1. Ch. 214. Vie de B. du Guescl. 38.

(p) Continuat. of Guill. de Nangis. 1360.



POPE himself. From this they were only diverted by the Marquis of *Montferrat*, a Sovereign Power, who by *Treaty* took them into his pay, and ventured to employ them in his wars in Italy. (q)

Five years passed on, during which France continued a prey to their ravages, in her fairest provinces, without a possibility of restraining them; and the complexion of the times, and the custom we have been considering, tended palpably to increase, instead of diminishing the evil.

The mode which had been adopted, of granting subsidies to particular Chiefs of renown, for the purpose of holding in readiness a constant supply of armed men, was favourable to the COMPANIES in the highest degree; and so far from being repressed, they were encouraged, and actually joined, by men whose names in other times, would have made them blush at their perversion of a profession, of all others perhaps the most truly noble, as well as the most brilliant. Accordingly, about this time, we find the character of these robbers raised, and the remembrance of their actions almost done away, by the accession of such men as CALVERLY, GOURNAY, ALBRET, AUXERNE, ANDREGHAM, a Marshal of France,) and even of DU GUESCELIN himself.

An immediate field of action was sought by these officers in *Spain*, where HENRY de TRANSTAMARE held his arms open to receive them; (r) and such was the weakness of *France*, that it was the only method she could devise, by which to get rid of such dangerous enemies. Upon those, therefore, whom CHARLES the WISE had at first treated as rebels, he condescended at last to confer a kind of *legitimacy*, by actually making a *Treaty* with them to evacuate

(q) Froiss. V. 1. Ch. 215.

(r) Froiss. I. 230.

France; in the course of which their Chiefs were entertained with all possible honour at *Paris*, (s) and received a supply of 200,000 livres as the price of their retreat. It was upon this occasion that Du GUESCELIN was given to them as a leader, and his influence with them was probably occasioned by the iniquitous offer of leading them first against the court of *Avignon*. In the course of that visit, the unfortunate Pontiff was treated with the utmost contempt and harshness by this celebrated General, who, all accomplished as he was in the virtues of *knighthood*, displayed upon this occasion the talents and the boldness of the most lawless freebooter. He exacted 100,000 florins for the ransom of *Avignon*, and ravaged the whole country till it was paid. (t)

After their well-known success in the cause of HENRY de TRANSTAMARE, the Black Prince resolving to restore the King they had dethroned, recalled all those of their number that depended upon England; and such was their reverence for his authority, that they instantly obeyed his summons, and forced their way out of *Castile*, in spite of all opposition, (v) only that they might return to it against the very cause they had so successfully espoused. In their second expedition, they were equally fortunate as in the first; and, upon their return into France, which they called their Apartment, (*leur Chambre*,) being dismissed by the Prince of Wales, they still continued embodied, and sat themselves down on the banks of the *Loire*. Farther they were desired not to retreat by EDWARD, who foreseeing the impending war

(s) One of these Chiefs was Hugh de Calverly himself, a very accomplished Knight of the English party, and, as we have seen, (Chap. XIV.) the brother in arms of Du Guesclin.

(t) See the particulars of this remarkable transaction set forth with much spirit, and at the same time, simplicity. *Vie de Bert. du Guescl.* 89, 90, 91.

(v) *Froiss.* 1. Ch. 279.

with France, told them he might still have occasion for their services. The king of France also, from the same cause, held a large body of them in readiness on the other side; and thus we again behold this memorable class of men, now *freebooters*, now regular soldiers, changing services and characters, as accident, or interest, or the exigencies of the times, required. In 1374, fourteen years after the rise of these Subsidiaries, upon the truce between France and England, ENGUERRAND de COURCEY, finding them without employment, entered into a Treaty with them to follow him into Austria, to the succession of which he laid claim.

Such then was the consequence, in the fourteenth century, of the custom of hiring mercenary troops; and I have judged it the more necessary to make this mention of them, because in the above examples we may observe an almost new and independent *state*, rising on the bosom, and in very spite of other States, and preserving themselves there, at first indeed by *force*, but afterwards by *law*.

Something not unfamiliar to this, arose even in the last century, during the height of the famous Thirty Years War; when, the whole Continent being in arms, and no profession known but the military one; the contending States saw vast bodies of men, strangers, as well as subjects, ranging themselves under the standards of various Chiefs, who owed their fortunes and independence solely to their talents for war. The universal disorder that prevailed, offered perpetual opportunities to their ambition; and according to their resources in raising men, or their ability in commanding them, they were courted and protected by the Sovereigns around them; *and by the Treaties they made*, became actually a kind of Sovereigns themselves.

The most illustrious of them were the gallant Count MANSFELDT, and the famous Duke of SAXE



WEIMAR. The latter was subsidised by RICHELIEU in the service of *France*. It was however in the same manner as many modern potentates are subsidized; more in order to annoy the enemy, than to augment the possessions of the *subsidizing* power. The Duke made conquests in his own name all along the Rhine; he took *Brissac*, the then key to *Alsace*, and garrisoned it for himself; and of such importance was his army, though the Sovereignty (if it was one) which they formed, was almost confined to their camp; that upon the death of their leader, the greatest Princes entered into Treaty with them for their services and their possessions. The Emperor, the King of France, the Duke of Saxony, and the Elector Palatine, were all rivals upon this occasion. The Emperor, as a Sovereign whom they had offended, but who was willing to forgive them; the King, as the power whose supplies had enabled them to keep the field; the Duke, as the heir by will of their late Commander; and the Elector, without any pretension at all, but that of money to *purchase* their right. This last, however, was known to be so powerful, that RICHELIEU did not scruple to arrest him on his way to the army, on the ground of his entering the kingdom without a Safe Conduct; (w) and being thus left with less potent rivals to combat, he succeeded in purchasing by a *Treaty of Subsidy*, the services of the army, and the conquests they had made in *Alsace*. (x) In the course of the affair, the acquisition of *Brissac* from the Baron d'Erback, the Governor for WEIMAR, is said to have cost the celebrated Marshal de GUEBRIANT as much trouble in

(w) Bougeant. Hist. de la P. de Westph. l. 5. S. 58.

(x) The heads of the army are described simply as the Gentlemen, Directors, and Officers of the troops which the late Duke of Weimar commanded; no mention is made of them as belonging to any Sovereign State. Du Mont. II. 184.



negotiation, as a regular siege would have cost him in war. (y)

Throughout the whole of these transactions, it is evident that the Duke of *Weimar*, who had not originally possessed a foot of land in Sovereignty, (z) was yet considered as a Sovereign by those who treated with him; and he is represented by an historian, as desirous of forming that establishment for himself in Alsace, which, while he lived, he jealously defended against his very employers the French, and which, had he not died, would have probably conferred upon him the title of its *Landgrave*. (a) These are some of the important consequences which in a time of *general and continued warfare*, may attend on the custom of subsidizing; the whole legal force and extent of which, must, as we see, derive their original spring from *Treaty and Convention*.

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### OF COMMON CAUSE.

**TO** Treaties is also owing another custom, which has been received by the Law of Nations, but which, whenever it takes place, is certainly an abandonment of that universal independence enjoyed under the state of nature. I mean the obligation by which particular nations have often bound them-

(y) Bougeant. l. 5. S. 55, 57.

(z) *Bernard* n'avoit pour tout bien, que l'honneur d'être issu de la branche aînée, de la Maison de Saxe. Id. Sec. 56.

(a) Id. Ib. Men who are fond of speculation might pursue the reflections which are naturally supplied by this account, as applicable to the present situation of affairs on the Continent. A very little time has passed since *Dumourier* promised to be as celebrated a soldier of fortune as the Duke of *Weimar*.

selves,

selves, to make *Common Cause* against others; and agreed not to lay down their arms except by general consent.

By these confederations, the connections of States were not only multiplied, but improved into very strict ties of amity, often ending in a departure from that impartial neutrality which in the abstract they preserve towards one another. The indiscriminate warfare which had attended the early Barbarians, came thus to be modified; nations ranged themselves under different alliances; a fixed object was proposed; and the embryos of what afterwards grew into the system called the Balance of Europe, began to appear.

The perpetual contests between the two great kingdoms of France and England, gave rise to many cases of this sort in the earlier parts of their history; and in arranging these alliances, they were naturally much governed by geographical situation. France sought a sincere and powerful friend in the King of Scotland, which produced the suspension of the *Jus Albinatus*, in favour of the latter nation; England, as naturally, looked to Flanders and to Spain for the same sort of assistance. So low down as 1197, we have a full example of it in the Treaty between RICHARD I. and BALDWIN Count of Flanders. In that Treaty it is agreed that neither party shall have the power of laying down his arms in the war against France, without the consent of the other; that even after that consent, and when peace shall be made, each shall be held ready to assist the other with all his power if the King of France should make war upon him; and the alliance is to endure, not only during their lives, but for ever between their heirs, whether their States shall be at peace or war elsewhere. (b) In the same manner an alliance

(b) Rym 1. 94.

exactly similar was made between the same Baldwin and King John; (c) and in consideration of the proposed marriage between HENRY III. and the daughter of the Duke of Brittany in 1225, the King of England agrees that he will make Common Cause with the Duke, against all his enemies; and that on the Continent, he will neither make peace, nor truce, with them, without his consent. (d)

In 1266 we have a very extraordinary Treaty of this kind between HENRY Earl of *Luxemburg*, and FERRY Duke of Lorrain against the Earl of Bar. HENRY obliges himself never to assist the Earl of Bar against Ferry, even though he (Henry) should be at war with Lorrain; and in that case also, if Bar should take the opportunity to attack Lorrain at the same time, he actually obliges himself to make peace and join his forces against Bar. (e)

It is evident I think, that the modern practice of making alliances of Offence and Defence arose from this, as they bear a near resemblance to it in effect, though their form is obviously different. All the distinction however, is, that our downright ancestors named the very persons against whom the alliance was made; while the modern refinements have confined it chiefly to Quotas, and wrapt up the object in general terms.

(c) Rym. i. 114.

(d) *Erimus eidem Duci consulentes & adjuvantes cum posse nostro, ad jura sua defendenda et perquirenda; et quod cum nullo de inimicis nostris et ipsius ducis, in partibus transmarinis, pacem faciemus, vel treugas capiemus, sine assensu ipsius ducis.*  
Rym. i. 284.

(e) Du Mont Corps Dipl. i. 224.

## OF RENDERING UP OUTLAWS.

UPON the same principle with the last are those articles of *Convention*, by which two, or more Powers agree to waive their right of granting an *ASYLUM* to the subjects of one another, and mutually to render them up even without being required.

The right of protecting all who may come within the bounds of an independent Community, has been always held one of the most valuable prerogatives of Sovereignty; and any invasion of it has ever been strenuously contested. Nevertheless to grant protection to those who have offended the peace of other communities, is itself little less than the same sort of crime. A difficulty not inconsiderable therefore arises in determining between the two contending rights, the readiest way of avoiding which, is by having recourse to *Convention*.

This was early adopted by the European nations, and Treaties are frequent by which it is stipulated that nations shall mutually give up to each others power, the criminals that may have sought refuge with them, from the justice of their own country. A few cases only of this sort need be mentioned. By a Treaty between WILLIAM King of Scotland, and HENRY II. of England, in 1174, it is agreed that if persons guilty of felony shall have fled from England to Scotland, they shall be immediately seized, and either be tried in the *King of Scotland's* Courts, or delivered up to the Justices of England, and vice versa. (f) By the Treaty of Paris, May 1303, PHILIP III. and EDWARD I. refuse to grant protection to each other's *Outlaw's*; (g) and by another, between CHARLES V. of France, and the Duke of Savoy, 1378, all malefactors who had fled for re-

(f) Rym. 1. 39. M. Par. 231. 37.

(g) Id. 2. 924.



fuge from *Savoy* to *Dauphiny*, or from *Dauphiny* to *Savoy*, were to be rendered up to justice, *even though they should be the subjects of the State delivering them.* (h)

These cases fell far short of those Treaties of Confederation formerly mentioned, but they serve to shew in an eminent degree, the manner in which the union of particular States came to be extended, and above all they prove to us the superior regularity of the times in comparison with those in which all strangers who came upon a foreign territory were immediately seized and reduced to slavery. (i)

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## OF TREATIES WITH POWERS, NOT CHRISTIAN.

BUT of the various effects produced by Treaties on the custom and practice of nations, not the least considerable was the amicable occasion which they afforded, to *Sets* of people of discordant religions and manners, of acquiring a better knowledge of each others institutions. This alone was a powerful instrument to soften those sturdy prejudices, which ignorance of one another never fails to inspire; for even in common life we generally observe, that the strongest antipathies may be contracted without foundation, and may be removed, simply by an opportunity of becoming acquainted.

It was thus in fact that the horrid enmity of the CHRISTIAN and MAHOMETAN nations, which had been generated by the strongest of all prejudices, and kept perpetually active by the evils which they had

(h) *Receuil des ordonnances.* ap. Villaret, 1. 553.

(i) *Vide Chap. VI.*

mutually inflicted, began at last to give way to the natural course of things.

To treat with *Infidels*, as we have formerly observed, was esteemed infamous; and the persons who could so far forget their character as Christians, were held up to public detestation. The notion existed long; it was a strong instrument in the hands of the Popes against the all-powerful *Frederick II.* (k) and not a weak one, so far down as the sixteenth century, when *Francis I.* was loaded with opprobrium in consequence of his alliance with the *Porte*. On this occasion, in order to regain his character in one point, that Monarch was forced to stoop to what was the greatest stain upon it in another. He had been among the first of the age in reputation for liberality, and clemency; yet he sullied his glory by executions that were only worthy the ferocity of a bigot. (l)

Even so far down as the beginning of the seventeenth century, these prejudices retained so much of their weight with the Protestants themselves, that GROTIUS thought it worth while to go at large into the question; and though he allows that, as a general position, it may be permitted, (or rather that it is not forbidden) to make an alliance with *Infidels*; yet he treats of these alliances with singular caution. For example, he says that care must be taken not to suffer the connection to be too intimate, lest it might be the means of corrupting weaker understandings; and for this purpose, if there are many *Christians* within an *Infidel* territory by virtue of an alliance, he thinks that after the example of the *Israelites* in *Egypt*, they ought to keep themselves as distinct as possible from the inhabitants. (m)

(k) See Chap. XIII.

(l) Daniel Hist. de Fr. fol. 2. 298.

(m) Cavendum enim ne nimia commixtio, contagium adferat infirmis, quam ad rem utile erit sedes distingui, sicut Israelitæ seorsim ab Ægyptiis habitarunt. De jur. B. et P. L. 2. cap. 15. S. II.

Again, if the alliance is likely to prove the means of rendering them too powerful, he absolutely forbids it, without the extreme of necessity; for, says he, there is nothing so just in itself, but must give way, if it is either directly, or indirectly hurtful to religion. He even goes on to say, that Princes and States ought to bear in their minds upon this subject, the pious and bold address of an Archbishop of Rheims to CHARLES the SIMPLE, when he told him that all men were terrified to observe him courting the friendship of the enemies of God, and making leagues with them to the destruction of the Christian name; for what *difference*, adds the holy Ecclesiastic, *is there between associating with Pagans, and denying God, or worshipping Idols?* (n)

Grotius finishes the subject with laying it down, that all *Christian* nations are bound to assist one another against the attacks of *Infidels*; and it was no doubt in consequence of the universality of these prejudices, that the cotemporary of Grotius, (Sir Edward Coke,) has advanced, or rather preserved, doctrines to the same purport, as forming part of the laws of England,

In the fourth Institute, the following positions, with their commentary, are supposed to be the settled laws of this realm.

There be four kinds of Leagues.

(n) Sed et si ex societate tali, profanæ opes magnum sint habituræ incrementum, abstinendum, erit extra summam necessitatem. Non enim jus quodvis sufficit ad id committendum, quod religioni, si non directe, indirecte tamen, nociturum putetur. Id. Sec. 11. 2.

Optandum esset ut multi hodie principes ac populi, in animum admitterent liberam et piam vocem Fulconis Archiepiscopi Remensis, Carolum Simplicem sic admonentis. Qui non expavescat vos inimicorum Dei amicitiam velle, ac in cladem et ruinam nominis Christiani, pagana arma et fœdera suscipere detestanda? Nihil enim distat utrum quissè paganis societ, an abnegato deo Idolas colat. Id. Sec. 11. 3.

I. *Fœdus pacis*; and that a Christian Prince may have with an Infidel.

II. *Fœdus congratulationis*, five *consolationis*; and this may a Christian Prince make with an Infidel.

III. *Fœdus commutationis mercium*, five *commercii*; and this also may be made with an Infidel.

IV. *Fœdus mutui auxilii*; and this cannot be done with an Infidel. (o)

These four positions, the learned Chief Justice founds upon examples drawn from the Jewish history; and the last of them, upon the example of JEHOSOPHAT, King of Judah; who having made an alliance with Achab King of Israel, an Idolater, was not only in extreme danger during the war, but was met after his return home, and slain by JEHU, for giving assistance to the enemy of God. (p) Thus, from cases drawn from a very antient part of the history of a very remote people, and who were under the government of very particular institutions, the Law of Nations, at least as it is made part of the Law of England, is supposed to inhibit alliances between *Christians* and *Turks*; "for thus," adds his Lordship, "the Laws of England, concerning these four Leagues, are as you perceive founded upon the Laws of God." (q)

With every proper deference for so high an authority as my Lord Coke's, this prohibition is now no longer law. Mankind have, in a great measure, left off persecuting one another on account of their religion; and Leagues offensive, and defensive, are made in every part of the world, without any reference to their points of faith. (r)

(o) Fourth Instit. 155.

(p) Id. Ib.

(q) Ib.

(r) E. G. between Christians, and all the various religions of Asia and America.



We are not however to suppose that this alteration is absolutely of modern growth. Though it was not very universal, traces of it are to be found far back in the history of Europe. It was *Convention* that first gave it birth, and the exterminating hatred with which the Christian and Saracen people beheld one another, was at length made so far to bend, as to admit of the propriety of entering into Treaties together. If I may be allowed the expression, they *conquered* one another into mutual respect; and Treaties once begun, a variety of good consequences followed. A freedom of intercourse was agreed upon; the forfeiture of liberty, of effects, or of life itself, was no longer the terrible punishment for the crime of entering into each others country; and what had long been prescribed by true religion, and even by common humanity in vain, was at last stipulated for with effect by express agreement. In many parts, the two races were so mingled together with the same district of country, that after having fruitlessly endeavoured to destroy one another, they came actually to consider that they were mutually entitled to the rank of *legitimate States*, and as such to form alliances, according as their political interests directed.

This was very much the case in Spain; a country nearly divided between the two religions, and the people of the two religions, often divided among themselves. In this situation, each party was constantly on the watch to prejudice the other as occasion might invite, and for that purpose interfered in the numerous petty wars of the Princes that shared the country, without much attention to the religion of those whom they attacked, or of those with whom they made alliance. Thus the weaker Princes of one religion, very often sought the protection of the other, against their more powerful brethren. The *Moors* who were expelled from their own States,  
took

took refuge with the *Christians*, and the *Christians*, on the other hand sought an asylum with the *Moors*. As the fortune of war also, was for a long time balanced among them, and States could not be entirely subdued, the two people in their intercourse together, were forced to imitate the customs they observed among themselves, and became *tributaries*, or bound by unequal alliances when a total conquest could not be effected. (s)

This sort of connection, notwithstanding the general prejudice upon the point, is to be discovered in other countries besides the Spanish kingdoms. As the Saracens had contrived to fix themselves in various corners of Europe, without the possibility of dislodging them; the Christian Princes, especially the more politic of them, began to think it lawful to soften the evil, by availing themselves of whatever good they could extract from it. When they could not

(s) A number of examples of this are to be found in the eleventh century.

*Sanchez*, Count of Castile, was the Auxiliary of *Zuleiman*, in obtaining the kingdom of Cordova from *Almahadi*, in 1008. The Count of *Barcelona*, was the Auxiliary of *Hissim*, the true Sovereign, in recovering it; and *Sanchez* abandoning the unsuccessful party afterwards entered into a firm alliance with the latter King.

The Count de la *Vela*, being driven from his little Sovereignty of *Alava*, in Castile, in 960, took refuge with the *Moors* of *Cordova*, with whom he made Alliances, and returned to the destruction of the *Christians*.

*Garcias*, King of Galicia, losing his dominions in battle to Castile, in 1070, fled in like manner, to the Court of *Seville*, the greatest of the *Mahometan* powers; and in 1063, the Moorish King of *Saragossa*, being under the protection of the King of CASTILE, and invaded by the *Aragonians*, the Christians took arms against the Christians in favour of their Moorish tributaries, and the famous *Cid* himself, commanded the protectors of *Saragossa*. Mod. Un. Hist. 16. 187, 8. 212. 17. 89.

*Peter* the Cruel also, in the fourteenth century, fled to the *Aïramolin* of Africa, whose daughter he is said to have married, in order to raise up a second party against his brother *Henry* de Transjamaire,—Froiss. & Vie de du Guesc. 156,

therefore

therefore root them out by *Conquest*, they endeavoured to make them useful by *Alliance*; and ROGER I. King of Sicily, though styled, as we have seen, by the Pope in the grant of that crown, the *Exterminator* of Infidels, (t) did not scruple to take whole bodies of Saracens into his pay. The same policy was pursued by WILLIAM III. (u) in the same island; and the Emperor FREDERICK II. defended a similar measure when it was imputed to him as one of the crimes which occasioned his deposition at the Council of Lyons. (v)

This latter Prince, who seems to have been eminently qualified in the arts of government, was far above the prejudices of his age in this respect; and a Treaty, nearly as regular, and calculated to produce as beneficial effects as any that have passed since his time, was effected by him with ABUSSAC King of Morocco, in 1230. By this it was agreed, That slaves should be rendered up on both sides; That the ports of *Africa* should be opened to the *Christians*, who should not be molested in their commerce either in going or coming; That the *Mahometan* merchants who came within the States of the Emperor, should be exempt from the payment of the tenth part of their effects; and that they should have liberty to send an intendant into the island of *Corfica*, who should have jurisdiction over the *Mahometans* there established. (w) This latter was plainly the same as a modern Consul, the custom of establishing which, throughout the trading nations of the world, has also arisen entirely from *Convention*. A Treaty similar to this was at the same time entered into with ABUSSAC by the Republics of *Venice*, *Genoa*, and *Pisa*, and by the city of *Marseilles*. (x)

(t) Chap. XIII.

(u) Burign. 2. 3. Fazellus calls him Roger II.

(v) See Chap. XIII.

(w) Leibnitz Cod. Deplom. p. 13.

(x) Id. Ib.

It is remarkable, however, how long Europe went on with these prejudices subsisting between the two religions, owing chiefly to the inveteracy of the Mahometan ignorance; the Treaties which England entered into with many of the Barbary States, in the present and last centuries, being little more than amplifications of this Treaty with ABUSSAC. They are a strong elucidation of the manner in which Convention came to change and to amend the errors of the Law of Nations. (y)

Alliances during the times before us, were not disdained between the two Religions even in the *East* itself, the climate in which the prejudices we have been mentioning were most predominant, and where they broke out into the most barbarous actions. Both *Christians* and *Mussulmen*, fought the aid of one another against their own brethren, when impelled to it by interest, mindless of the general hostile principles that inflamed them.

For example; The Crusades had always been destructive to the Greek Empire, though it was ranked among the worshippers of Christ. During the first of them, in the eleventh century, the Greeks were supposed to have got rid of their ruinous guests by the infamous means of poison. During the second, in the twelfth, they endeavoured absolutely to prohibit their entrance, by making a close league with the Sultan of Syria himself. (z)

In 1166 the Caliph of *Ægypt*, beheld the armies of a *Christian* King of Jerusalem, march to defend him against the Mahometan Despot, and submitted to what was considered as a species of pollution by his Courtiers, in receiving the Ambassadors of Jerusalem, in person, and ratifying with his own hand, the treaty of subsidy which had been made with them. (a) In 1185, the Pope himself (*Lucius III.*)

(y) See Chap. V. (z) Vie de Salad. par Mar. L. 9.

(a) Gulielm. Tyr. 14.



condescended to solicit the friendship of the accomplished *Saladin*; (b) and it was to an alliance made with the latter in 1191, by Guy de Lusignan, King of Jerusalem, against *Raymond* Earl of Tripoli, that the total expulsion of the Christians from that celebrated kingdom was ultimately owing. *Saladin*, like many other auxiliaries, more powerful than those they assisted, seized the opportunity which was given him by an interference thus invited, and conquered for himself, what he was in vain expected to restore.

In the course of time, Alliances became more frequent, and not long before the application of *Francis* I. to the Porte, for assistance, the end of the fifteenth century beheld the same sort of case, when *Alphonso*, King of Naples, and even the Pope (*Alexander* VII.) sent to implore the aid of *Bajazet*, against the celebrated invasion of *Charles* VIII. (c) From that time, the prejudices of religion, and of a barbarous policy, have been gradually giving way before the slow, but certain effect of *Treaties*: The Porte, and even the African States, have taken their place in the *European* Commonwealth; and though many nations continue to make war without ceasing upon the latter, yet it is in consequence of their *piratical* maxims, rather than their religion. At any rate, wherever they have been persuaded to adopt the milder law of nations inculcated by the Christians, we may observe that the mode of doing it was by positive Convention.

Thus by the third article of the Treaty with Algiers in 1686, (d) it is stipulated that the persons and goods of passengers on board the ships of the King of England, shall not be *stopped, taken, or plundered*.

(b) Vie de Salad. par Marin. i. 423.

(c) Iter. Hierosol. ap Gale. chap. v. Guiccard L. i. an. 1494.

(d) Vide Marine Treaties, p. 259. Quarto.

*ed*: By the fifth, *all use of torture is inhibited*: By the sixth, persons who have suffered shipwreck, *are not to be made slaves*. In cases however which are out of the Treaty, the Algerines maintain the right which under a different Religion and Moral System they assume, since they also stipulate that to confer these immunities upon the English, a *Pass* shall be necessary for every ship; and those which have none are to be considered as a fair prize. (*e*)

The eleventh article exhibits the operation of Treaties in favour of Religion, and the distinction which is preserved between the professors of different faiths; it being stipulated that if any *Christians* escape on board ships of war, they shall not be demanded; in consequence of which, the Algerines make a condition that before this privilege shall be allowed to take effect, notice shall be given of the arrival of such ships, and public proclamations be made to secure the Christian captives.—The twelfth article entirely forbids the slavery of the subjects of Great Britain within the territory of *Algiers*.

Similar Treaties were made about the same time with Tripoli, and Tunis; (*f*) and by the eleventh article of the Treaty with the latter, 1751, a great point is gained in prohibiting all piracy whatsoever within ten miles of Gibraltar and Mahon; it being agreed that prizes from *every* nation made within those limits, shall be restored.—All these pretensions of the Barbary States had long as we have seen, been abolished among the Christians, in consequence of their consulting the true spirit of their duty, and their existence thus late among the Mahometans, can only therefore be attributed to the influence of an opposite and intolerant Religion, which made them

(*e*) Treaty August 10. 1700. Art. 2 *Id.* p. 265.

(*f*) Treaty. August. 1700. *Id.* p. 275,

reject that law by which we are *peculiarly* taught to love our neighbour as ourselves.

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## OF CONVENTIONS RESPECTING COMMERCE.

WE come lastly to consider one of the most important effects of Convention upon the laws of the world, in the improvement which it palpably introduced into its Commercial Intercourse.

Upon the broad subject of Commerce, as beneficial, or prejudicial to mankind, its mystery and nature, or the chronology of its general improvements, it does not fall within the scope of this Treatise to speak; nor, if it did, should I attempt it after the elaborate volumes upon the matter, which crowd the libraries of Europe. I shall merely therefore touch upon those parts of its history, in which the subject before us is more immediately concerned.

As far as it may be said to relate to the Law of Nations, from the *universality* of its adoption; it owes its regulation almost entirely to positive *Convention*. For although there is a natural disposition in men to truck and barter with one another, yet the modes by which this shall be done, or whether it shall be done at all, must be left to *Institution*.

A writer of eminence on the law before us, at the same time that he places it among the *bounden duties* to encourage the *commerce* of States; admits that they have the power of making what restrictions they please upon it, and that others are obliged to submit to them, on the supposition that they are founded on good reasons. (g) All things that contribute to

(g) Vattel. L. 2. Ch. 2. S. 21. et infr.

the extension of this intercourse, he however also classes among our *duties*; as the care of Highways; the security of the Seas; the establishment of Ports; and the regulations of Markets and Fairs. (*h*)

As a general position, drawn from the morality which Christians are bound to follow, we cannot perhaps dispute this. But whether they can be derived, (*as duties*,) from the law of nature alone, (and such is the foundation of Vattel's whole system,) or whether, *setting the Christian morality out of the question*, it is not left to the absolute will, and even to the whim, or caprice of nations, to neglect all these circumstances, it may not be unreasonable to doubt. (*hh*)

Certain it is, that there have been times when they have not only been neglected, but the very opposite conduct has been pursued, of which a variety of proofs have been given in the course of this work. The Law of Nations upon the subject while left to itself, even long after the establishment of CHRISTIANITY, was so extremely vague and indefinite, that no one could collect what was the conduct with respect to Commerce, which men had a right to expect from one another.

In this uncertainty, the positive *Institutions* of mankind, did that for them, which the *law of nature*, (according to our system,) would never have obliged them to do; and which the turbulence of the world, and the little real knowledge they possessed of their religion, had hitherto prevented it from teaching them. It may however be observed, that Religion had so far its share in the improvement of *Commerce*, as probably to have been the real, though invisible cause of the abrogation of those barbarous and dishonest practices, which retarded its progress; and at

(*h*) Ib.

(*hh*) Vide Suarez De Leg. ac Deo Legislat. 2. 19. 7.



all events, whether it was Religion, or mere *natural* benevolence, or absolute and immediate interest, or a combination of all three; still it was through the medium of *Convention* and positive *Institution*, that the object was obtained.

The instances of barbarity that have been recorded in the course of this work, will serve to shew how little an intercourse which depends so entirely upon public security, could flourish during the earlier ages. It was hardly even possible for men to exercise a distant traffick, when every pass by land was infested with robbers, and every Sea was filled with Pirates, who pursued their callings, under *honourable* appellations.

I would not however be thought to mean, that this was the only, or even the chief cause, why Commerce did not flourish. While the spirit of the age was entirely military, people were less inclined to turn themselves to occupations so contrary to their taste; and when the magnificent discoveries of the fifteenth century, opened new worlds to their contemplation, every sort of difficulty was made to bend to the genius which they inspired. Before this however, many nations had begun to discover the necessity for a more humane and safer intercourse; and not being then upheld by a general spirit of Commerce, they had recourse, to *Convention* in some measure to supply its place. Accordingly, so far back as the time of CANUTE, efforts were made by express Treaty to obtain a mitigation of those heavy taxes and tolls with which travellers to Rome and other parts seem to have been loaded. That Monarch obtained from the Emperor CONRAD and Pope JOHN, "*Ut eis concederetur lex æquior, et pax securior in via Roman adeundi, et ne tot clausuris per viam arcerentur, et propter injustam telonium fatigarentur.*" (i) The maritime States also, soon

(i) Will. of Malms. L. 2. C. ix.

after the commencement of the period before us, found it necessary to make several provisions for the security of their mutual communications; the most striking of which were, the punishment of *piracy*, and the abolition by law, of the cruel rights pretended to by the inhabitants of coasts, against strangers who might arrive, or be driven upon them.

Of this, instances, as it may be supposed, were most frequent, among those who had been most infamous for the practices in question: and if the regulations that were made, had been only in a small part observed, the customs of the maritime people would have then been as eminent for their humanity as they had before been infamous for their savageness and horror.

By a law of the *Swedes*, every housekeeper on the coasts, the Clergy and Nobility not excepted, was subject to a tax to relieve and repair the loss suffered by shipwreck. “*Fortunam ejus qui naufragium perpeffus est, sublevare et refarcire.*” (*j*) The Danish law proceeded upon the most regular principles of Justice, and it probably affords the earliest example of *Salvage*, regulated by public constitutions. It ordained that the whole of the goods that were wrecked, should not be restored, but a certain portion of them be set apart for the people who had been called out to assist those in distress, and who were to be rewarded by the Master and Owners, according to an assessment to be made by the magistrates and maritime Præfects. (*k*) The Constitutions of Si-

(*j*) Steirnhook, L. 1. Pt. 1. C. ix.

(*k*) *Dani bona naufragantibus non restitunt omnia, sed plebem, præmio auxilii proposito, ad opem naufragis ferendam, navenique et merces periculo expositas pro re rata conservandas ac recuperandas evocant. Posteaquam ita allatum est auxilium; Præfectura Maratimæ, Præses et Consul et Senatores definiant quantum mercedis pro rei conditione, merciumque pretio, auxiliatoribus a navarcho, vel mercatore persolvi oporteat. Jus Dan. ap. Wilk. 104.*

cily

cily under Frederick II. also deducted a portion of the merchandise saved, and any one who stole any part of it, was not only condemned to pay four times the value, but to suffer death. (l)

In the same, and even a greater spirit of humanity, is the following law of Æthelred. Et quælibet Navis mercatoria, pacem habeat quæ intræ portum veniat, licet sit inimica navis, si sit tempestatu jactata. Et licet non sit jactata, & confugiat ad aliquam pacis curiam, & homines confugiant ad curiam illam; tunc homines illi pacem habeant, & ea quæ secum portant. (m)

The English, (the long continuance of whose barbarous laws with respect to wrecks would mark them with infamy, had they not amply made up for it by the wisdom and humanity of almost all their other constitutions,) can however boast that foreign Merchants became early the objects of their protection and encouragement, since by MAGNA CHARTA, they are allowed to go, and to come, and to remain in England, by land and by water, for the purposes of trade, as it is expressly stated, "*per antiquas et rectas consuetudines.*" (n) It is the more likely that these were the *Antiquæ Consuetudines*, since in the reign before that in which Magna Charta was enacted, the laws and customs of the *Sea* had been a favourite object; and the laws of OLERON, which were actually composed under the direction of RICHARD I. became not only much in request, but formed the *common usages* among the maritime States, when their vessels passed through the British Seas. (o)

Of

(l) Constit. Sicul. L. 1. Tit. 28, 58. ap Lindenbrog.

(m) Leg. Æthel. ap Wilk.

(n) Mag. Char. Cap. 30. The venerable Bede, more than four hundred years before this, had called London, "*Multorum populorum Emporium.*"

(o) See the record *On the Dominion of the Sea*, quoted by Coke, 4th Instit. 142. *Leges et Statuta per ejus Antecessores Angliæ reges,*

Of these laws, there are several articles, which mark very curiously the barbarous manner in which a barbarous nation conducts its struggles into good order. The XXIII<sup>d</sup> and XXIV<sup>th</sup> of them are as follows.

If a Pilot undertakes the conduct of a vessel to bring her to St. Malo, or any other Port, and fail of his duty therein; so as the vessel miscarry by reason of his ignorance in what he undertook, and the merchants sustain damages thereby; he shall be obliged to make full satisfaction for the same if he hath wherewithal; *and if not, lose his head.*

And if the Master, or any one of his Mariners, or any one of the Merchants, CUT OFF HIS HEAD; *they shall not be bound to answer for it:* but before they do it, they must be *sure* he had not wherewith to make satisfaction.

The reader's own ideas of jurisprudence will point out to him, the manifest impropriety of allowing the Master, or any of his Mariners to be at the same time the judge and accuser in a case of such importance; and to cut off a man's head in a moment, as it may be supposed, of passion and revenge. Such however was the law.

The XXV<sup>th</sup> and XXVI<sup>th</sup> Articles are longer, and infinitely more just, though fully as severe. The Lord of the Coast it seems, had a right to the third or fourth part of the ships that were lost, and the Pilots, (in the language of the law) “ in order to ingratiate themselves with their lords, and to gain to themselves a part of the ship and lading, did like faithless and treacherous villains, sometimes

ges, dudum ordinata ad conservandam pacem et justitiam INTER OMNES GENTES, NATIONIS CUJUSCUNQUE, *par mare Angliæ transeuntes.* Quæ quidem Leges et Statuta, per dominum Richardum quondam regem Angliæ in redditu suo a Terra Sancta correcte fuerunt interpretata, et in Insula Oleron publicata et nominata in Gallica lingua *La Ley Oleron.*

“ even



“ even willingly, and out of design to ruin ship and  
 “ goods, guide and bring her upon the rocks; and  
 “ then, feigning to aid, help, and assist the now dis-  
 “ tressed mariners, were the first in dismembering  
 “ and pulling the ship to pieces,” &c. To remedy  
 this, the law declares that the Lord of that place;  
 the Salvors; and all others that are concerned, shall  
 be accursed and excommunicated, and punished as  
 thieves and robbers; and the Pilot “ shall be hang-  
 “ ed upon a high gibbet, which said gibbet shall  
 “ abide and remain to succeeding ages, on that place,  
 “ as a visible caution to other ships that shall after-  
 “ wards sail thereby.”

The fate of the Lord is still more severe. “ He  
 “ is to be apprehended, his goods confiscated and  
 “ sold, and himself fastened to a post or stake in the  
 “ midst of his own Mansion House, which being  
 “ fired at the four corners, all shall be burned toge-  
 “ ther; the walls thereof be demolished; the stones  
 “ pulled down; and the place converted into a mar-  
 “ ket place, for the sale only of hogs and swine, to all  
 “ posterity.”

The XXXIst Article describes most horrible cus-  
 toms, and as horrible punishments to prevent them.  
 It recites that when a vessel was lost by running on  
 shore, and the mariners had landed; they often, in-  
 stead of meeting with help, “ were attacked by peo-  
 “ ple more barbarous, cruel, and inhuman, than  
 “ mad dogs; who to gain their monies, apparel,  
 “ and other goods, did sometimes murder and de-  
 “ stroy these poor distressed seamen. In this case,  
 “ the Lord of the country, is to execute justice by  
 “ punishing them in their persons and their estates;  
 “ and is commanded to plunge them in the sea till  
 “ they be half dead, and then to have them drawn  
 “ forth, out of the Sea, and stoned to death.”

Such was the severity which Institution found it  
 necessary to oppose to the savage violences that had  
 been

been so inimical to Commerce; and though it was in all probability, not always inflicted, yet the laws of *Oleron* which authorised it, and which, as we have seen, were the governing customs of the nations that navigated the *British Seas*, are said to have been taken as a guide in forming the institutions of the famous commercial city of *WISBUY*.

This last was for some time, particularly about the end of the twelfth century, the most flourishing trading city of the North; and is described by *Olaus Magnus* to have risen to a great height of commercial consequence, by the security which it afforded to all comers both by sea and land. He adds a remarkable expression, (*nulli præclusum municipium*,) by which it should seem that every one was admitted to a participation of its privileges. Encouraged by this, all the greater nations of Europe, thronged to it for the purpose of Trade, and even those who approached near to their original simplicity, for so possibly the learned Archbishop may mean by the *Singulæ gentes suos proprios vicos et plateas incolentes*. (p) This gave so much influence to the inhabitants, that all those who navigated the *Baltic*, are said to have governed themselves by the laws and principles of the Consulate at *Wisbuy*; and to have adopted from them a kind of *Law-Merchant*, which being regularly digested, decided differences by sea, much sooner than arms could decide them by land. (q)

Into the detail of these laws, it does not fall within our subject to enter; we cannot however help re-

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marking

(p) *Confluxere illuc Gothi, Suedi, Russi seu Reutheni, Dani, Prussi, Angli, Scoti Flandri, Galli, Finni, Varolali, Saxones, Hispani; singulæque gentes, suos proprios vicos et plateas incolentes, nulli præclusum municipium.* *Ingredientesque, terra et mari, omnia paccata invenerunt.* *Olaus Mag. L. 2. C. 24.*

(q) *Ab hac etiam Insula (Gotlandia) in omni navigantium controversia, præsertim a Consulatu Wisbyensi petitur et datur jus,*  
et

marking on the care that was taken for the security of ships against the attempts of their crews by the following articles.

Whoever drew a sword upon the Master of a vessel, or wilfully falsified the compass, was condemned to have his right hand nailed to the mast. (*r*)

Whoever behaved riotously was condemned to be keel-hauled. (*s*)

Whoever was guilty of rebellion, was to be thrown overboard. (*t*)

It was unlawful also to arrest the Master, Pilot, or Mariners of a vessel for debt, *when about to set sail*; though the creditor might seize any thing belonging to his debtor which he could find *in the vessel*; (*u*) and this was a very small part of the regularity introduced by these laws, which became in a manner the laws of the world, since they extended, says the historian, from the pillars of Hercules, to the North Seas; (*v*) and we have here therefore a full instance of Conventions entering into the composition, and forming part of the Law of Nations.

et sententia diffinitiva, quid unicuique permittendum vel auferendum erit. Certe Jus hoc Mercatorum ac valde prudenter digestum, citius lites adimit in fluidis aquis, quam aliorum decisio in terra arma. Ib.

(*r*) Ol. Mag. L. 10. c. 16. p. 448.

(*s*) Nothing can be more minute than Magnus's description of this punishment. Qui vero tumultuarius aut injuriosus fuerit, funiculo ligatus uno latere navigii subtus immerfus, ex altero sub dorso navigi retrahitur, atque si propter absorptam in surgite aquam opus fuerit, supinus reponitur, aut pronus, ne intereat suffocatus.—Id. Ib.

(*t*) Ib.

(*u*) Artic. 6. L. of Wisbuy Comp. Bo. of Sea, Laws. 176.

(*v*) Hæ et similis pæneque, imo graviore, ex constitutionibus vetustissimæ Urbis Wisbuyensis, &c. repetentur.

Tamen leges maritimæ et decisiones omnium controversiarum singularitur longe lateque usque ad columnas Herculis, & ultimum mare Scythicum ex ea peruntur & datæ observantur, &c. &c. Olaus Mag. L. 10. c. 16. They continue also according to Anderson to be observed to this day by the nations bordering on the Baltic. Hist. of Commerce, 1. 179.

But

But one of the most remarkable public Deeds relating to Commerce, and in which the principles of Trade, and the rights of nations with respect to it; seem to have been best understood, is to be found in the famous letter of King *Edward VI.* translated into Greek and other languages, which was borne by Sir Hugh Willoughby and Richard Chancellor, two celebrated navigators, in their attempt to discover Cathaye in 1553.—After setting forth the disposition to cultivate the love and friendship of his kind, implanted by the Almighty in the heart of man, the consequent duty of all, according to their power; to maintain and augment this desire, and the conduct of his ancestors in this respect which had ever been “to shew good affection to those who came to them from farre countries;” the Letter proceeds in form to say :

“And if it be right and equity to shew such humanitie to all men, doublesse the same ought chiefly to be shewed to Marchants, who wandering about the world, search both the land and the sea, to carry such good and profitable things as are found in their countries, to remote regions and kingdomes, and again to bring from the same; such things as they find there commodious for their own countries: Both as well that the people to whom they goe, may not be destitute of such commodities as their countries bring not forth to them, as that also they may be partakers of such things whereof they abound. For the God of Heaven and Earth, greatly providing for mankind, would not that all things should be found in one region, *to the ende that one should have need of another*; that by this meanes friendship might be established among all men, and every one seeked to gratifie all. For the establishing and furtherance of which universal amitie, certaine men of our realme, moved hereunto by the said desire,

P 2

“have



“ have instituted and taken upon them a voyage by  
 “ sea into farre countries, to the intent that between  
 “ our people and them, a way may bee opened, to  
 “ bring in and carry down merchandizes, desiring  
 “ us to further their enterprizes. Who, assenting  
 “ to their petition, have licensed the right valiant  
 “ and worthy SIR HUGH WILLOUGHBY, Knight,  
 “ &c. according to their desire, to goe to countries,  
 “ to them heretofore unknown, as well to seeke fitch  
 “ things as we lacke, as also to earry unto them from  
 “ our regions, fitch things as they lacke. So that here-  
 “ by not only commoditie may ensue both to them and  
 “ us, but also an indissoluble and perpetual league and  
 “ friendship, &c. We therefore desire you Kings  
 “ and Princes, and all other to whom there is any  
 “ power on Earth, to permit unto these our servants,  
 “ free passage by your regions and dominions; for  
 “ they shall not touch any thing of yours unwilling  
 “ unto you.—Consider you, that they also are men.  
 “ If therefore they shall stand in neede of any thing,  
 “ we desire you of all humanitie, and for the nobi-  
 “ litie which is in you, to aide and help them with  
 “ such things as they lacke.—Shewe yourselves to-  
 “ wards them, as you would that we and our sub-  
 “ jects should shewe ourselves towards your ser-  
 “ vants, if at anie time they shall passe by our re-  
 “ gions.” (w)

Such was the language of our ancestors two centuries and a half ago, than which the most enlightened and virtuous statesman of modern times, could not produce any thing more wise, more just, or more consonant to the truest ideas of the rights of Commerce.

The Commerce of the *Flemish* States which afterwards grew so famous, was early the object of regulation by Trade; and so far back as 1203, it was agreed by *Henry Duke of Lorraine*, and *Theodorick*

Earl of Holland, that the merchants of each should have liberty of ingress and egress in their respective dominions, by land and by water; the mode by which their differences should be settled, was prescribed in form; and they were bound not to require securities for their debts, till they had applied for justice to the Courts of the Towns where they happened to be, and were denied; in which case they were permitted to take securities. (x)

It was probably in consequence of the regularity introduced by such *Conventions*, that when the King of *France* had ordered the arrest of some English merchants and their goods within his territories in 1242, the transaction is blamed by *M. Paris* as contrary to old practice, and derogatory to the antient dignity of the kingdom. “*Rex Francorum, Mercatorum Anglia corpora, cum suis bonis, per regnum negotiantium, secus quam decuit capi feraliter imperavit; lædens inormiter in hoc facto, antiquam Galliae dignitatem.*” (y)

This arrest was upon the breaking out of a war; and nations had proceeded far towards regularity, considering the atrocities which had so long distinguished them, when a conduct, mild in comparison to what had been the practice but a few years before, was talked of in such terms. The *antiqua Gallie dignitas*, suffered the same blot, so late as the year 1793, five centuries and a half afterwards, (z) and the custom of *Spain* on the breaking out of war, has been almost constantly the same; so that in this respect, we cannot be said to have advanced far beyond our ancestors. In 1528 we have a visible proof of the improvement introduced by Conventions into the commercial intercourse of States, in the pro-

(x) *Recueil des Traitez.* 1. 43.

(y) *Mat. Par.* 585.

(z) When the Convention of France ordered the bodies and goods of the English Merchants once more *feraliter capi*.

tection which it was agreed to afford to one another's merchants upon the breaking out of war between Francis I. and the Emperor. It was afforded, according to the express language of the Plenary powers of the French Ambassadors, because many goods and merchandises belonging to the subjects of both of them remained mutually in their respective possessions, and therefore on account of the war, might be hostilely detained, to the great loss of the innocent owners; *immeritorum possessorum, nisi privatis eorum commodis mutuo, ut par est consulatur.*

(a) In the next year we have another instance of the protection of commerce, even during the height of hostilities between two countries; when HENRY VIII. and the EMPEROR, agreed upon a neutrality of the *Netherlands*, on account of the mutual sense they had of the benefits which each of them derived from Trade. (b)

These are at least some of the effects upon the interesting law before us, which as far as I have been able to discover, were brought about by positive *Conventions*; and in conjunction with those other causes which form the subject of the three last Chapters, they were the means of reducing the Western nation to a state of comparative regularity, from the frightful desolation occasioned by the Barbarians.

(a) Rymer, 14. 235.

(b) Hume. 3. 164.

## C H A P. XVI.

## OF THE RANK AND CLAIMS OF THE NATIONS OF EUROPE.

**W**E have in the last place to consider, according to our plan, the remarkable claims concerning their rank and privileges, which the Western nations were perpetually asserting; the principles which governed those claims; and the consequent regulations which were made by degrees, so as to enter into their Code of Law of Nations.

Possibly no part of law may to philosophers appear so frivolous as that of which we are now about to treat, which gravely endeavours to regulate what at best must be considered as mere vanities. The consciousness of worth, and the natural respect which is paid to power and merit, may be said, and with great truth, to be sufficient rewards of themselves alone, without involving ourselves in ridiculous and mortifying contests, to force them into higher public notice, and mark them with a broader public stamp, than they would naturally obtain if left to themselves. The opinions, however, of philosophers, have always been long in acquiring such weight with the world, as to be able to correct its prejudices, and of all other prejudices, those which take hold of its pride and dignity. Accordingly, our ancestors gave themselves up, without even seeming to feel the folly of their conduct, to an immoderate and perpetual contest for rank and pre-eminence, often as destructive, as in general it was ridiculous!

Had they barely contended, the mention of the subject would not here be made; but as they con-  
tended



tended with a shew and semblance of rights, and the gravest names affected to rest matters upon principles which have actually found a place in their Codes of Law; it is but a necessary consequence of our undertaking, to investigate the subject in form, In the same manner as an enquirer into the history of our municipal laws, although he might laugh at, or pity the ignorance which could gravely-undertake to treat of *Witchcraft*, would be bound to review such laws and notions concerning it, as are known to have existed. We must smile, however, to reflect that what, in the abstract, is in reality so trifling, and of such little genuine importance to the true interests of States, should be in fact one of the most difficult points to determine. The greater features of Europe, its superb systems, the Assemblage of its Princes in Councils, and the whole train of its interests, may all of them be tolerably well made out, by an attention to facts and to principles. But the place which its different Sovereigns were supposed to hold in the scale of *Dignity*, and the rules which governed their claims to precedence, are so involved in obscurity from the dearth of clear and decided cases, and so liable to derangement from perpetual contentions, that the balance of power, or a nice case in morality, is more easily to be understood and decided, than a contest between the Ambassadors of two rival States, for the first place in the *Drawing Room* of a Sovereign. This is obviously owing to the same cause which renders all other cases of the Law of Nations difficult to settle; namely the want of a competent sovereign tribunal; for upon the broad common of Europe, the universal independence of its various States, rendered the whole subservient to caprice, or to chance, according as the temporary power, the temporary obstinacy, or the temporary good humour of Kings and Councils might direct. Hence *Van Bynkershoek*, in mentioning

ing this subject, confesses himself absolutely unable to decide upon the point, and asserts that the attempts of all others upon the matter have equally failed. (a)

When such an authority has renounced the undertaking, it is not our ambition to attempt it; but in pursuance of our plan, we shall content ourselves merely with stating what actually has been thought, and, when we are so lucky as to meet it, what actually has been decided by our ancestors.

Upon the simple question of rank, it should seem, beyond a possibility of doubt, that when nations are equally independent, they must all *originally* be equal in rights. And if a particular place or dignity, *to the exclusion of others*, is supposed (as it naturally must) to be a *right*; no power on earth can be competent to say, *quoad* this point, which, among Independent Nations, are to be considered as superior, and which, as inferior; nor is it of any consequence, that one possesses a more numerous population, a greater extent of territory, or its Sovereign a higher sounding title than another. Upon this part of the subject we may make use of Vattel's illustration, where he observes, that when the question is concerning the *rights* of Man, it matters not whether he be full grown, or only a *dwarf*. (b) As however the fact certainly is, that some Powers are more considerable than others in the great Society of the World, he confesses that the smaller ought to yield to the larger, not their equality of right, but when it can come into question, (as for example at a general Council or Congress) the mere *priority of place*, amongst equals. (c)

(a) Quæst. Jur. Pub. L. 2. c. 9. Bynkershoek glances at Jacob Gothofred, who composed a long work called *Diatriba de Jure Præcedentiæ*.

(b) Vattel. Prelim. 18.

(c) Id. 2. 3. 37.

A great and proper deference for decency and order, no doubt drew this observation from *Vattel*, but I confess I do not see the justness of its foundation. In the intercourse of common and social life it certainly holds good, but wherever *Rights, Independence, and Equality*, are expressly to be represented, and *instituted forms* are in consequence to be fulfilled, it becomes even a very high *duty* in the Inferior, to assert himself to the utmost point; it is "the ninth part of a hair" for which every man of spirit would cavil. Thus, in Popular Assemblies, or where the Representatives of a great Nation are met together, it would not only be far from indecent, but it would be even cowardice, and meanness, for the poorest member to wave his privileges as to equality of rank, because he met in the transaction of business, with some individual, more powerful or wealthy, *out of the Assembly*, than himself. But exclusive of this, and even upon the supposition that a State inferior in power and wealth, ought, by the law of Europe, to yield to one superior in these points; it is always difficult to make out that *superiority* in sufficient clearness; and, from the want of a competent Judge, should the contest be pushed with any perseverance, nothing short of actual trial, in other words, of actual war, can decide it. To say then that the inferior, *ought to yield the priority of place*, is to advance nothing *certain* with respect to the law and custom of precedency; or, what is worse, it is to advance what is calculated to inspire contending parties with additional obstinacy and hatred.

This assertion of Equality, however, by no means goes the length of a claim, to *superiority*. In the present day, contests of this kind have for the most part been laid asleep, either by a composition, begun long ago, which has brought on a mutual yielding; or, what is most usual, by a comparative abolition of those ceremonies where contests might arise.

The

The time is not, however, long past, since the different Courts of Europe plunged into the warmest altercations on this account, and have quarrelled like madmen, or pouted like children, not because their *Equality* was invaded, but because their *pre-eminence* was not allowed. These contests were common to all States whatsoever, and so far were they from being peculiar to the most eminent for riches or power, that the smallest Sovereignities, according to *Bynkershoek*, “*ad ravin usque vociferantur et insaniunt* ;” and the smaller the State, the greater the madness. (d) Certain it is that the precedency was so long considered of consequence by very grave men, that *Boorel*, an Ambassador of reputation and a Dutchman in the last century, writing to the accomplished *De Witt* concerning a contest between him and the Ambassador of *Savoy*, discovers much spleen against the Savoyard, whom he mentions as a petty Prince whose revenues do not amount to above 1,200,000 crowns, and proposes that *France* should be called upon to guaranty the rights and privileges of the Republic, among which he thinks its rank with respect to other nations is not the least. (e) So also, in the instructions given to Lord *Manchester*, when he went Ambassador to *Venice* in 1697, and to France in 1699, very particular injunctions are laid upon him, “that  
“ he take care to be treated upon all public occa-  
“ sions, in the same manner as the Ambassador of  
“ France and Spain ;” (f) in consequence of which, perhaps, it was, that when the Ambassador of *Portugal* had chosen to advance into M. de Torcy’s room

(d) Quo minor est auctoritas qua nitaris, eo major infania est. Quæst. Jur. Pub. L. 2. c. 9. He quotes the case of Ambassadors of two Italian States, who meeting on a bridge at Prague where only one could pass at a time, remained all day on the spot because neither would give way to the other.

(e) Lettres de De Witt. 2. 384.

(f) Coles Mem. of Aff. of State, 232.

before



before his Lordship, he makes a public complaint of it both to the French Minister and his own Court, talks with littleness of *returning* his rudeness, and it is made the subject of four or five letters, in which the Ambassador, the Secretary of State, and King William himself, take part before it is settled.

It is inconceivable into what importance these trifles used sometimes to swell, so as to become of consequence to the most material interests of whole kingdoms. About the year 1600, the long wars of Elizabeth, and King Philip of Spain, drawing towards a conclusion, commissioners met on both sides for the settlement of a peace at *Boulogne*; but altho' each of the parties appeared in earnest, yet, from the moment of their arrival, difficulties were started concerning the *precedency*, and those difficulties were never got over. The *Spaniards*, who, a century and a half before this, had been divided into a number of petty states, had almost constantly yielded the point to the *English*. But the great and almost sudden power of their monarchy, arising from the fortune of CHARLES V. had induced his son to start pretensions to the precedency of all the Powers of Europe. In pursuance of this, the Spanish Ambassadors insisted that the conferences should be held at their lodging; but they were told by the English, that the Queen might as well have sent them to treat in their very country, which they knew had been refused; and Sir Thomas Edmonds, whose reputation was high among the statesmen of that time, observes in a letter to Secretary Cecil, that they were resolved "not to yeald, or to give away anie jotte of her Majesty's honour." The *English* Privy Council offered *equality*, or to get rid of the matter "by some way of indifferency, without prioritie to either;" but it was refused by the *Spaniards*; and the high-spirited ELIZABETH being thus provoked, affirmed "that she would never do herself that

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" wronge

“ wronge, as to yeald in that poynt any manner of  
 “ superiority; being resolved as soon to keep her  
 “ sword drawn for the maintenance of her honour,  
 “ as for her possessions.” The Spaniard continuing  
 immoveable, she desired “ that they might roundly  
 “ be told her resolution; so that however the ac-  
 “ tion might stand or fall, they might not go away  
 “ with any note or opinion of having been more re-  
 “ solute on the matter than herself.” Accordingly,  
 (g) the whole treaty went off upon it; nor was the  
 peace finally settled till some years afterwards, un-  
 der a more pacific successor.

In the conduct of this dispute, much enquiry, as  
 it may be supposed, was made into the matters and  
 arguments fit to be adduced in support of the digni-  
 ty of nations. They were the subjects of many of  
 the letters between the Ambassadors and the Privy  
 Council of England; and *Sir Robert Cotton*, the ce-  
 lebrated antiquary, was employed to draw up what  
 he called “ A Briefe Abstract of the Question of  
 “ Precedency between England and Spaine.” With  
 the force of his reasoning, as it related exclusively  
 to the two nations, we are not here particularly con-  
 cerned; but his arguments, as they related to *all*  
 European nations whatsoever, it may not be improp-  
 er to state.

He divides, then, the precedence of Kings into  
 that of Place and Person. The first is made to de-  
 pend upon two circumstances; upon antiquity, as a  
 kingdom, (which is again subdivided into antiquity  
 as a *Christian* Kingdom,) and upon eminency of the  
 Throne Royal. The last is also subdivided into the  
 nobility of the blood of the reigning family, and  
 the antiquity of their government; (h) thus:

(g) Winwood's Memorials. 1. 203. 204. 222.

(h) Cotton. M. S. preserved in the Harleian Manuscripts.

Precedency of a King, in respect of	Place	{	Antiquity	{	Kingdom, or a
			as a		Christian King- dom :
	Pe rson.	{		or	
				Eminency of the Throne Royal.	
		{	Nobility of Blood,	{	
			or		Antiquity of Government.

I. Concerning the first point, namely, of ANTIQUITY ; there is nothing in this which is not a very general prejudice among all nations, the origin of almost every people who boast themselves *original*, being carried beyond the power of record into tradition and fable, and ending, for the most part, with the commencement of things, or with the Gods themselves. Thus, not to go into antient Europe, the Scandinavians derived their origin from a celestial founder in ODIN ; (i) the Germans from a God called TUISTON, or the Son of the Earth ; (whence the country was antiently called *Twitsch*, *Deusch*, and *Deutschland*) ; (j) and the English from BRUTUS the Trojan, (k) and BRENNUS the Gaul ; (l) the first of which was actually pleaded with great gravity by EDWARD I. when he claimed the sovereignty of Scotland, in a letter to Pope Boniface VIII. (m)

And hence, nearly all writers on this subject have concurred in a maxim as true, “ Bonum quo antiquius, eo melius ; ” (n) than which, perhaps, upon investigation, none will be found to be so little supported by good sense.

(i) Edda ap. North. Antiq.

(j) Pfëffel. Dr. Pub. D'Allem. 1. 2.

(k) See the whole question seriously debated in Milon's Hist. of Eng. B. 1.

(l) Howel on Preced. 23.

(m) Du Mont. Corps. Diplom. 1. 322.

(n) Howel, 149.

With respect to the priority of conversion to *Christianity*, almost all the writers concur in acknowledging it as a very weighty reason for precedency, (o) few or none having ventured to call it in question, except *Sir George Mackenzie*, who had the honour of Scotland to support. (p). It is remarkable, however, that *Grotius*, though he acknowledges it in his *Treatise*, fell so far into these prejudices, as to deny it afterwards, when, as an Ambassador, it militated against himself. Being at *Paris* in 1637, on the part of *Sweden*, a contest for the first place in a cavalcade at the reception of the Dutch minister, arose between him and the *Earl of Leicester*, Ambassador of England. The matter being first fought for with the sword, in which the English had the advantage, was afterwards debated with the pen; and Lord *Leicester* urging the priority of conversion in his nation, *Grotius* refused to allow the force of the reason; alleging, in the very spirit of altercation, that if such an argument were allowed, it might prevent the conversion of *Pagans* and *Mahometans* to *Christianity*. (q) To such streights are, sometimes, even the wisest and most philosophical minds reduced, and thus liable are they to be governed by the very prejudices which they wish to despise. In the ceremonial, however, of the Pope's chapel at *Rome*, where all the Sovereigns of Europe had their places assigned them with particular functions, the point is firmly settled, and forms the chief and almost only guide in arranging the precedency. In all great assemblies also, which were held under ecclesiastical authority, in which the same Sovereigns assisted, such as synods and

(o) Gothofred. De Jur. Præced. c. 3. n. 23. Grot. D. I. B. et P. 2, 5, 22. Howel, 9, 10, 11.

(p) Mackenz. Laws and Cust. of Nat. as to Preced.

(q) Vie de Grot. par Burigny. 1. 1. 4, 5, 6. There is there a detailed account of a contest for precedency, in which the arguments are as good as the subject will admit.



councils, the same governing principles of course prevailed. Hence in the contest at *Bologne*, above-mentioned, it was pleaded by the English Ambassadors, that at the councils at *Constance*, *Pisa*, and *Sienna*, their place was next to the *Emperor* on the left hand, the Spaniard not contesting it till the council of *Basil* in 1431; (r) and that after a long dispute between the Kings of *England* and *Spain*, inter Sacra de sedendo, it was determined by Pope JULIUS II. *pro tempore*, in favour of *England*. (s)

With respect to the other division of *Place* namely, *Eminency of the Throne Royal*, it is made to consist, by *Cotton*, in "the absoluteness of authoritie " political," by which he means an absolute independence of all superiority, as Lords Paramount; on the absoluteness of authoritie ecclesiastical, by which he means independence of the See of Rome, even among Catholics; and on the Eminency of the Royal Dignity; by which he means, generally, any thing that adds to the splendour of Monarchs; such as the titles they have borne; their feudal superiority over other subordinate kingdoms; their being marked out, as it were, to derive the power from divine right, by receiving the Sacred Unction, an honour formerly only enjoyed by four, (t) and the superior antiquity of that honour; to which, to the reputation of *England*, he adds, with much gravity, the cure of the *King's Evil* as a peculiar sign of the favour of Heaven.

II. As to the first subdivision of precedency in respect of *Person*, namely, "*the Nobility of Blood*," it is very strenuously insisted upon by other writers besides *Cotton*; particularly *Sir George Mackenzie*, and *Howel*, who enumerate the various exploits of a King's ancestors as a reason for their taking rank of

(r) *Cotton M. S. Quest. of Preced.*

(s) *Winwood's Memoir.* 1. 196.

(t) *Germany, France, England, and Spain.*

others less known and remembered. (u) Hence the battles of *Creffy*, *Poitiers*, and *Agincourt*, are pleaded on behalf of the Kings of England; and at the famous Council of *Trent*, where there arose many contests for rank, and the nobility of Princes came often into question, it was pleaded by *Bavaria* against *Venice*, that it had antiently enjoyed the *Electoral* Dignity; and by *Savoy* against *Manua*, that its house was infinitely more illustrious, and had been honoured with the title of Highness. (v)

As to the second sub-division of *Person*, namely, the antiquity of the government of the reigning family, it has provoked much contest from the Jurists. *Mackenzie* having Scotland expressly in his view, rests upon it almost entirely, in preference to all the rest. “No rank,” says he, “can be acclaimed by a country, *as such*, because all countries were created at the same time, and none can know which was first inhabited; neither can it be claimed by priority of conversion to Christianity; for Christianity rather discharges all care for precedency; nor by the decisions of councils of churchmen, who always preferred those who were best able to do them service. It is the *antiquity of the family alone*, that can decide it. Even custom, (consuetude,) he goes on to state, cannot change this part of the law, which was in order to secure the public peace and interest of mankind; and it is not therefore to be overthrown by the partiality of churchmen, or the pride and power of other *Competing* and rival Princes: nor can such precedency, in the opinion of the antient Jurists, be waved, even by express paction; since, though it may seem that every man may renounce that which is understood in his own favour; yet he cannot renounce it when it is *not* principally introduced for his own sake,

(u) Howel on Preced. 38. 43.

(v) Wicquefort. De L'Ambass. L. 1. S. 25.

but for the sake of the common interest of mankind, *by the Laws of Nature and Nations.*" (w)

Thus far the Scottish civilian, who with very honest partiality concludes, that the King of Great Britain may claim the precedence of all other Kings, *inasmuch as that he is properly King of Scotland.* (x) On the other hand, it is cogently shewn by *Grotius* and *Vattel*, that it is the weight and independence of the people themselves, not the mere duration of the empire of the reigning family, which determine what is due to their rank and place. The sovereignty of the nation, say they, continues the same, whatever alteration may be made in the form of that sovereignty; and all its duties are still to be fulfilled where they are owing, although not only the *Person* of the Governor, but the Government itself, is annihilated. Its rights are therefore also in force, and ought equally to be exacted. Hence when England altered its form of Government under *Cromwell*, the alteration made no difference in its rank among other states; and that hardy usurper, however low himself in point of dignity, demanded, and actually received, the same honours which had been paid to its Kings. (y)

Upon the whole, however, *Antiquity*, generally speaking, and without having reference to the family in preference to the nation, or to the nation in preference to the family, seems the fairest reason for rank; fairer even than riches and power: for these as has been observed, among independent states, or persons who are equal in rights, ought not to weigh any thing: whereas even where they are equal in rights, it seems but natural that he who was first received into an order, should chuse his place; a circumstance which is daily exhibited in common life,

(w) *Laws and Cust. of Nat. as to Preced.* 5, 7. (x) *Id.* 3.

(y) *Grot. D. J. B. et P.* 2. 9. 8. *Vattel.* 2. 3. 17, 18.

where we observe that in all public bodies, the member who is first admitted, generally takes the lead as to place; nor is there any thing more common, where all other pretensions are equal, than for seniority to determine it. And hence an old constitution of *Theodosius* and *Valens*, is mentioned with approbation by *Grotius*; (z) in which it is laid down, that amongst those who possess the *same* rank, he who *first came* to be possessed of it, ought to take the lead.

And so much with respect to Antiquity, as conferring a right to pre-eminence among the states of Europe. Other arguments, however, have found their advocates, of which some may be thought to be of weight, though some are mere redundancies. Thus *Vasquez*, a civilian of renown, and Ambassador from Spain to the Council of Trent, where a very solemn contest arose between *France* and *Spain*, adduced in support of his master "the Antiquity of the Catholic Religion in his country; that the first *Christian* church was built, and the first council celebrated there; that he was King of *Jerusalem*, which by its sacredness ought to take rank of all others; that he possessed subjects of great nobility and goodness; that he was superior to others in riches; that he had greater reputation, and possessed larger means of bestowing benefits upon the world, from his extensive commerce." (a) The French, on the other hand, pleaded the nobleness of their kingdom, which possessed so pure an air, that the moment a slave set foot in it, he became free; the strength of their government; their exploits in war; the *absoluteness* of their King, and the title of "Most Christian," which had been bestowed upon him. (b) To these have been added, for other Kings, the

(z) D. J. B. et P. 2, 5; 21.

(a) Wicquef. Del'Ambass. ut sup. Howel. 138.

(b) De Callieres Man. de Negoc. 1. 315. Howel. 99. Wicquef. ut sup.



number and goodness of cities; the soundness of laws; the succession of *legal* Sovereigns, as contradistinguished from *tyrants*; (c) the grandeur and hospitality of courts. (d) In a contest between Denmark and Sweden, at the Council of *Basil*, the Archbishop of *Upsal* claimed precedence for his master, before all the Sovereigns of Europe, as successor of the Gothic Kings, who had exacted tributes from the Emperors and Kings of France; (e) while, in opposition to this, Denmark demanded pre-eminence, because it formed one of the states of the empire.

And thus, we may observe, that every state, while contending for this high and delicate point, has brought forward every sort of argument, however weighty, or however trivial, which could apply exclusively to itself, nor, had we nothing more to guide us, could we possibly say what it was that determined it. Even as it is, we can arrive at little certainty; and we must content ourselves, therefore, with the little that seems to have been confessed, and the few cases of priority that have actually been decided.

Amongst these, the first that strikes us, is that uniform and uncontested pre-eminence which was allowed to the Sovereign Pontiff of Rome; whose *spiritual* power, by giving him the title of THE FATHER OF CHRISTENDOM, naturally threw around him a superior awfulness and majesty, and procured him, without opposition, a veneration which none

(c) Mackenzie. 6.

(d) Howel. 35. 46. 74. 85. It is curious to remark how far a man may be carried in support of a favourite point. This last author, amidst various matter which may appear of consequence, adduces, for Great Britain, the quantity of snow "which, like "a gentle white rug, doth cover the ploughed fields;" the immense plenty of beef, mutton, and veal, which was furnished for the royal tables, and the circumstance that the Yeomen live like Gentlemen; the Gentlemen like Noblemen; the Noblemen like Princes, and the Lord Maor and Sheriffs like Kings." P. 46, 47.

(e) *Vie de Grot. par. Burign.* 1. 387.

other could pretend. We have in a former chapter (f) entered somewhat at length into that remarkable part of the constitution of Europe, by which the POPE was considered as the Director of all Christian Sovereigns; and from what was then said, it would appear, that a Power which was invested with such stupendous and real authority and influence, would claim, and receive, as a mere natural consequence, the very first rank in all circumstances where a comparison of rank could arise. Accordingly, his pre-eminence, before the division of the Church, by the Reformation, was so far from being contested, that the greatest Princes submitted to the performance of offices even menial about his person, and to the well known humiliation of kissing his foot; which, for the sake of him whom he was supposed to represent, they cheerfully allowed. Thus, in the ceremonial of Rome, the Ambassadors of the various Sovereigns had their places and duties regularly marked out; such as the bearing of his train, or of his hood, and the delivery of his Chalice. The canon law affirms, that so early as the time of CONSTANTINE the Great, the Emperors held the bridle of his horse in the procession, which was allowed ever after, with very few exceptions, and his place at the chapel was decided to be no higher than his footstool. (g)

Consistent also with the principle which inculcated these humiliations, the embassies to Rome were always considered more as a mark of submission to that court, than as a matter of business. They were generally conducted with the greatest splendour, and conferred upon noblemen of the highest quality, whose titles of Ambassadors of *obedience* emphatically marked their designation. Such embassies were expected from all the states of Europe,

(f) Chap. XIII.

(g) Mackenz. 29.

and were almost universally sent; and so uniformly was the doctrine inculcated, that when the missionaries in the East had converted some nations of *Japan* to CHRISTIANITY, they exhibited a decisive proof of it in three *embassies of obedience* which were sent by their Kings to Rome in 1575, by which the Pontiff was addressed as “the *Adorable*, who holds the “place of the King of Heaven upon Earth.” (*h*) From all this it necessarily followed, that the Pope’s Ambassadors, wherever they appeared, took rank of the Ambassadors of all other Sovereigns. They went under the appellation of *Nuncios*, which was particular to themselves; and in conformity with the supposed subject of their mission, they have sometimes been called Angels of Peace. (*i*)

But the influence of the Church, with respect to precedency, did not stop here. That sanctity which the *spiritual* character was supposed to confer, extended itself to all who were invested with it; and *Churchmen*, with a deference in the Laity, which is strictly proper, were allowed to precede on all occasions. In the higher ranks, however, this arose to a point which is almost inconceivable, and can only be explained upon principles peculiar to the ecclesiastical polity of Europe. As the POPE was allowed without contest to be the head of the *Christian* world, it was presumed by the zealous supporters of his authority, that the *Cardinals*, who were nearest to him in dignity, and whose authority could only emanate from his own, enjoyed a rank and place in the estimation of men to which even some Sovereigns could not aspire. They therefore often claimed, and sometimes actually obtained the precedency of Kings themselves. Thus by the ordinance of *Sixtus V.* it was settled in the ceremonial of Rome, that

(*h*) Voltaire Espr. des. Nat. 5. 203.

(*i*) As at Trent, in 1544. Fr. Paol. L. 2.

if Kings and Cardinals met together at table, or other solemnities, the first place should be enjoyed by the first Cardinal Bishop, the second by a King, the third by a Cardinal, and so on alternately. (*j*) A distinction, however, seems to have been made by some statesmen between Kings that were hereditary and those who were only *elective*; the pre-eminence of Cardinals being enjoyed, as it should seem according to them, only with respect to the latter. Thus, when Lord *Nottingham*, in his splendid embassy to Spain 1604, solicited to dine with the King, he was given to understand, by the Minister, *Oliveres*, and the Constable of Castile, that it was directly against the ceremonial; and that the Pope's Nuncio himself, “ *who being by his degree a Cardinal, was to take place of some Kings that were elected, and not hereditary*, had never been admitted to that honour (*k*). In compliance with these prejudices, many inferior Sovereigns, such as the Duke of Saxe Weimar (*l*) have yielded in rank to them; and PHILIP II. himself, when Prince of Spain, though son to the *Emperor*, was contented to be treated as an equal. (*m*)

The second great point which seemed to be settled in the ceremonial of Europe, was the precedence of the KING OF GERMANY, EMPEROR OF THE ROMANS, or, as he is often inaccurately called, the EMPEROR OF GERMANY.

There were of old, very warm contests in the Courts and Chanceries of Princes, concerning the relations which the titles of King and Emperor have to each other; the Monarchs who were honoured with the latter, concluding that it was far superior to the former. This distinction arose from the pre-

(*j*) Mackenz. 30.

(*l*) Mem. touch. les Ambassad. 80.

(*m*) Wicquef. p. 265.

(*k*) Winwood. 2. 70.



eminence claimed by the Emperors of the *East* and *West*, who shared the old Roman dominions over the various tribes of Gothic Kings or leaders, who by degrees destroyed them. Accustomed to the most splendid ensigns of dignity, and, for a great length of time, to a superiority immense and uncontested over any single King that came within the sphere of their intercourse; even enjoying, besides, the tribute and homage of almost all who surrounded them, they saw their precedence confessed and submitted to by the rest of the world. As, therefore, the other nations broke in upon them by degrees, and it was by intervals that they parted with the provinces which composed their dominion, it was not unreasonable for them to continue to affect the antient pre-eminence, of which they had so long been *legally* possessed; and as the Scandinavian Chiefs who established themselves one after another upon their territories were known by the title of *Kings*, they pretended to preserve a difference between that and their own designation of *Emperor*.

In reality, however, as has been learnedly shewn by *Selden*, the difference there was between them, was, if any thing, in favour of the *Kings*, the word *Emperor* signifying no more than the leader of an army, with which, modest as it comparatively was, the antient Roman despots were obliged to content themselves, from the hatred which they knew to be borne by the people to the word *King*. At the same time it may be right in this place to enquire a little into the real significations of this latter denomination, as it may be of consequence in the elucidation of several of the customs of Europe which we are about to enumerate, and which, from seeming difficulty, were often attended with much confusion and dispute.

The word *King*, then, in the abstract, can be considered merely as a general denomination or title, conveying

conveying the idea of command and pre-eminence over others, but which may admit of various gradations, and be invested with very different prerogatives. The Heads of numberless petty nations have often been called by this denomination, and I think inaccurately so, unless we admit of this division. Thus, the Chiefs of different tribes of men, that have been met with in voyages of discovery, are often and loosely called *Kings*. The Chiefs of anti-ent *Gaul*, *Germany*, and *Britain*, are so called by *Cæsar*, who in the single province of *Kent* enumerates *four* persons dignified by the title of *Reges*. <sup>(n)</sup> The leaders of various Celtic and Scandinavian hordes, who settled themselves in Scotland, Ireland, and the Isles, preserved for a long time this splendid appellation, which, with respect to the Isle of *Man*, existed even in our own memory. <sup>(o)</sup> In some countries it has also been given even to the *Sons* of the King, as a mere augmentation of their dignity, without carrying along with it any of that authority with which in general it is invested; as was the case in the antient Constantinopolitan Court, and, during very early times, in Spain; <sup>(p)</sup> and it may be said to continue to this day in the Empire, where the apparent successor is called King of the Romans.

But without troubling ourselves with enquiring into the nature of the sovereignty of all who have borne the title, we may, for the most part, follow the general sense of the division which Lord Coke has made of it, into Kings independent and paramount, and those who are subordinate to them. “The regal Estate and Dignity of a King,” says

<sup>(n)</sup> De Bell. Gall. 5. 22.

<sup>(o)</sup> In antient Britain these inferiour Kings were in such plenty, that the Paramount *EDGAR* obliged *eight* of them to row him in his barge upon the river *Dee*. Chron. Brompt. apud Twyfsden, 864.

<sup>(p)</sup> Selden. Titles of Hon. Ch. 3.

that

that learned writer, “ are of two manners: the one  
 “ is Imperial, or Supreme; who owes no mean  
 “ feigniorie, or attendancie of corporale or bodily  
 “ service, or allegiance, to any other wordly Prince  
 “ or Potentate, and from whose sentence there is no  
 “ appeal. There is also a King, and he a *Homager*  
 “ or *Feudatory* to the Estate and Majesty of another  
 “ King, as to his superiour Lord. The King, which  
 “ is supreme and imperial, is *equivalent within his*  
 “ *land to the power and authority that Cæsar can chal-*  
 “ *lenge within his own dominions*; and such a King  
 “ challengeth, of right, to set upon his head a crown  
 “ Imperial, with a diademe elevated on high, to  
 “ signify the perfection of greatness of their estate:  
 “ but to the other Kings, *homagers*, a crown not  
 “ elevated is due.” (q)

This division of Kings, into *Homagers*, and *Pa-*  
*ssant*, was however not well understood in Europe  
 in very antient times, and the confusion which was  
 made of the two dignities, will serve to explain the  
 reason for the assertion of several absurd and ridicu-  
 lous pretensions, in the old Emperors of the East and  
 West. Many Chiefs of nations, having been confessed-  
 ly *vassals*, or *homagers*, as we may call them, to the  
 anti- and integral Roman Empire, its Supreme  
 Monarch, who was called *Imperator*, conceived that  
 there was a wide difference between their appellati-  
 ons and his own; and although a division was made  
 of the *Eastern* and *Western* Empires, yet the Sceptres  
 of both being still considered as *Roman* Sceptres, and  
 as such pre-eminent over others; the Sovereigns  
 who swayed them continued to preserve the distincti-  
 on. Nor was it of any consequence that the Despot  
 of the *East* changed his appellation of Emperor for  
 that of Αἰσχυράτης and Βασιλεύς, for as they were equi-  
 valent in the language of the country to the old one

(q) Fourth Instit. 343.



of *Imperator*, the same distance was supposed to be preserved between him and the surrounding *Kings*.

This pre-eminence, however, was warmly contested by the sturdy conquerors of the Princes who affected thus to degrade them; and being no longer *Kings Homagers*, many of them assumed the same style with the Emperors, both of the *East* and of the *West*; calling themselves by the titles of *King*, *Imperator*, or *Basileus*, as their fancy directed. Thus the Saxon EDGAR was styled frequently in his charters, “*Albionis et Anglorum, Basileus*,” and in one to Oswald, Bishop of Worcester, he is called “*Anglorum Basileus, omniumque Regum Insularum, Oceanique Britanniam Circumjacentis, &c. Dominus et Imperator*.” (r) So also WILLIAM RUFUS, when he had quarrelled with Anselm, Archbishop of Canterbury, *who appealed to the Pope*, finding that the Emperor HENRY V. claimed to nominate another Pope *in virtue of his Imperial power*, asserted immediately that no Archbishop or Bishop of his kingdom could be subject to the Pope, *the King having the same power within his kingdom as the Emperor possessed within the Empire*. (s) The idea is continued in the time of HENRY VIII. it being declared by a Statute of one of his Parliaments, “that by divers and fundry old authentic histories and chronicles, it is manifestly declared and expressed, that this realm of England is an *Empire*, and so hath been accepted in the world, governed by one supreme head and King, having the dignity and royal estate of the *Imperial Crown* of the same.” (t) A similar sense is evinced by the words of the Act of an Irish Parliament of the same King, in which the Kings

(r) Selden. Tit. of Hon. Part 1. ch. 5.

(s) Mat. Par. 19.

(t) 24 Hen. VIII. c. 12. See Lord Coke's reasoning upon it. 4th. Inst. 342.



of England are called, "Kings and *Emperors* of the "realm of England, and of the land of Ireland;" (u) and by other Statutes of Elizabeth and of James. (w). All this shews that the English have had as high an idea of the power, state and dignity of their crown, as that of any contemporary Monarch, under whatsoever appellation denominated; nor will it be incurious or irrelevant to remark, that even the Protector *Cromwell*, in 1654, was reported on the Continent to have been declared, "Oliver, the first "EMPEROR of Great Britain, and the Isles thereunto belonging, always Cæsar," &c. (x)

The French had a like idea of the dignity of their Crown; and when, upon their great contest with Spain for Precedency at Trent, in the sixteenth century, the Spanish party hinted that their Master was upon the point of obtaining from the Pope, the title of EMPEROR of the INDIES; the French Ambassador *Lanfac* answered, that that title would make no alteration in the state of the affair, nor oblige "the "EMPEROR of FRANCE" to yield to them one moment the sooner. (y) In various old charters the King of Spain also is styled "Disponente Deo, Hefperia *Imperator*," and "Deinutu Hispaniæ Imperator, una cum conjuge Imperatrice." Alphonso IX. of Castile, defining what *Kings* are, asserts that they are placed over their people to govern them in their kingdom, "Bien assî comme el Emperador en suo Imperio;" and hence the city of *Toledo*, being the chief city, is termed "Cabeca del Imperio del "Espana," and assumes in consequence, for its arms, the image of an Emperor in his Imperial habit. (z) The same dignity is also claimed and enjoyed with-

(v) Selden ut sup.

(w) 1. Eliz. c. 1. 1. Jac. c. 1.

(x) Thurloe's State Pap. 2. 614.

(y) Wicquefort. L. 1 S. 24.

(z) Selden ut Sup.

out any pre-eminence or authority over other Kings by the *Tzar*, or *Czar* of the Russias, which signifies nothing more than *Great Duke*, (a) but the affinity of which to *Cæsar*, has induced many to believe that it is exactly the same dignity with that assumed by the Roman Emperors.

Upon the whole then, it will follow that there is no pre-eminence naturally and intrinsically attached to the name of *Emperor*, over that of *King*; and that if the Sovereign of Germany enjoyed, or enjoys the Precedency of other Monarchs, it is not in virtue of his being an *Emperor*, (a title which any independent Sovereign might, or may assume,) but in consequence of some other accident of his Crown.

This accident, (if I may so call it) was his succession to the *Roman Sceptre*, as swayed by the Western Emperors, which every body knows took place under Charlemagne, who in the year 800, “ *Imperato*  
“ *in Æde sacra a Leon pontifice et civibus Romanis*  
“ *festiva acclamatione salutatus est, ROMANORUM*  
“ *IMPERATOR AUGUSTUS.*” (b)

Upon this celebrated transaction there arose among the European nations, two very important questions.

I. Whether the old Western Roman Empire really revived in the person of Charlemagne?

II. If it did, what rights were renovated with the Imperial Title? To which we in modern times may add a third; namely, What affinity there was between the *kingdom* of Germany and the Roman Empire, so as that the Monarchs of the one are ipso facto Sovereigns of the other?

Concerning the first of these questions, it seems to have been settled on all sides, that the transaction

(a) Lord Carlisle's Embassy to Russia, Temp. Jac.

(b) Conringius De Imp. Rom. Germ. S. 17. See also Baror. Annal. Sigonius de Regn. Ital. ad ann. 800. Struvius Corp. Hist. Germ. Per. 4. Sec. 1. 1. 33. 34.

at Rome in the year 800, was a legal renovation of that magnificent Empire which had for so many ages governed the European world; and throughout the histories, we accordingly find the conqueror of Lombardy, and deliverer of Rome, mentioned as the successor of the Western Cæsars. This succession is grounded upon the following reasoning; That throughout all the revolutions which the Empire underwent, and however absorbed its various provinces might have been by various other nations, still the *Roman People* continued the same, and a part of them having recovered their liberty by the march of CHARLEMAGNE across the Alps, they could proceed to the *legal* exercise of all their old rights: That among these rights, that of electing the EMPEROR was confessed, and therefore although the fortune of different conquerors might for a time have prevented them from exercising it, yet when the restraint under which they had laboured was taken off, they returned to it by a kind of *Postliminium*: That the first use they made of it was to invest their Deliverer with the Imperial Power, who thus, *by an Election of Roman Citizens*, became the Sovereign of all that was left of the Empire, and together with the Sovereignty assumed the Imperial Title. (c)

With respect to the second question, namely, what rights were renovated with the renovation of the Imperial Title, there was formerly much more difficulty than in determining the first. The old Empire had been completely dismembered, and so strong a prescription could be pleaded against any claim

(c) Great part of the reasoning is in Grotius, 2. 9. 11. Pfeffel, Dr. Pub. D'Allem. 1. 37. contents himself with saying, that the old Western Empire revived. Putter, 1; 6. with a discussion of the rights actually assumed by Charlemagne, not the right of the people to confer them. The reasoning is liable to a variety of observations, but as the question is only concerning what was actually allowed by the world, it is needless to enter upon them.



that might be set up concerning the antient provinces that had been torn from it, that the advantages which CHARLEMAGNE acquired, could only be said to extend to the *Imperial title*, and those fragments in Italy which at that time might be thought to compose the Roman State, and which latter he had before been thought to have obtained in quality of *Patrician* of Rome. (d) Nevertheless, as it remarkably happened that this conqueror was personally in possession of a great proportion of the antient Empire, (the fruits either of his sword, or of peaceable succession) and the antient dominions came thus adventitiously to be governed by him who bore the antient title; a jumble was made by many of the Civilians in after times concerning these two points, and it was inculcated, that not only the Imperial Title, but the Imperial power and prerogatives over all the old kingdoms which had composed the Empire, had revived in Charlemagne and his successors. Hence, Sigonius in his account of the election of CHARLEMAGNE asserts, that that Monarch “*officio suo convenie*” “*est arbitratus, ut Italiam, atque universam Chris-*” “*tianam Rempublicam ordinaret.*” (e) Hence also, when the OTTOMANS, in the tenth and eleventh centuries, had possessed themselves of this great dignity, they imagined they could exercise a certain Sovereignty over foreign Kings, as well as over the Princes of Germany; and the idea was spread abroad, that as the whole of *Christendom*, considered as an ecclesiastical society, had one visible *spiritual* head, which was the Bishop of Rome; so also, in conformity with antient prerogatives, they ought to obey one *temporal* head, which was the *Roman Emperor*. (f). Foreign kingdoms were therefore called upon

(d) Quare etiam Scriptores adferere non dubitant, *Carol. m.* Roman, antequam *Imperator* fieret, *suis sceptris addidisse* Struv. Corp. 4. 1. 26.

(e) Sigonius De Reg. Ital. L. 4.

(f) Putter. 2. 3. Martens Precis du D. des Gens. 1. 25.



to acknowledge a degree of supremacy in the Germanic Emperor, which was actually complied with by *Denmark, Poland, and Hungary*; (g) and which also, as the Emperors have boasted, was allowed by *Spain, France, and England*. (h) Certain it is that the Emperor SIGISMUND, while in France, sat in the royal seat in a full parliament there, and exercised an act of Sovereignty in knighting the Seneschal of Beaucaire; and HENRY II. of England, writing to FREDERICK BARBAROSSA, has these most remarkable expressions. “Regnum nostrum, et quicquid  
 “ubique nostræ subjicitur ditioni, vobis exponimus,  
 “vestræ committimus potestati, *ut ad vestrum nutum,*  
 “omnia disponantur; *et in omnibus vestri stat voluntas Imperii.* Sit igitur inter nos et populos nostros, dilectionis et pacis, unitas indivisa, commercia tuta: ita tamen *ut vobis qui dignitate preminetis,*  
 “imperandi cedat auctoritas, nobis non deerit voluntas  
 “obsequendi.” (i) RICHARD I. also is said by Hoveden to have deposed himself from his kingdom of England, et tradidit illud Imperatori (Hen. VI.) sicut Univerforum Domino. Selden, reasoning upon this incident, observes that this was done under *duress*, and that the right was *released* by the Emperor before his death. (j) But although this is a fair plea with respect to *Richard's* Sovereignty over *England*, there was no occasion, while delivering up his kingdom, to add even under *duress*, Sicut Univerforum Domino, unless such had been the Emperor's pretensions in those times.

(g) Putter. lb. Pfeffel, however, says, this was in right of conquest with respect to Hungary. Dr. Pub. D'Allem. 1. 212. 216.

(h) Putter ut sup.

(i) Lyuelit. Hen. II. Append. No. 5. Selden, with more indifference than is usual with him, endeavours to get rid of this, by saying it is a mere letter of compliment. Tit. of Hon. ch. 2.

(j) Id. lb.

Another, and a stronger proof of these pretensions, may be drawn from the Emperor's power of creating *Notaries*, (at that time a kind of *Magistrate* acknowledged by the old civil law,) in kingdoms which were otherwise perfectly independent of his jurisdiction; and the existence of this privilege, may be shewn from the very endeavour to get rid of it. *Selden* infers much from the circumstance that in the elder times, Public Notaries who enjoyed their authority either from the Pope or Emperor, were not at all, or were *rarely* admitted in any use in *this* kingdom. Lord *Coke* goes farther, in saying that they claimed *de jure* to exercise their offices here in England; but because it was against the dignity of a supreme King, they were prohibited by the King's writ. But other kingdoms were forced to make express laws in order to assert the supremacy of their Monarchs in this particular, which in *Scotland* was done so late as the time of JAMES III. by an Act of Parliament which seems fairly to acknowledge the existence of the prerogative.—It enacts, “That our  
“Soverain Lord has full jurisdiction and free Em-  
“pire within this Realm; that his Hienesse may  
“make Notaries and Tabelliones, qua his instru-  
“ments shall have full faith in all causes and contracts  
“within the Realm; and in time to come, that na  
“Notary maid, or to be maid, by the Emperor's  
“autoritie, have faith in contract civil within the  
“Realm, *lesse then he be examined by the Ordinar, and*  
“*apprieved by the King's Hienesse.*” (k)

It is wonderful how high these ideas of the Imperial prerogatives in Europe were for a long time carried; *Julius Firmicus*, an old author, (l) affirms with respect to them, that “Totius orbis Terrarum  
“spatium, Imperatoris subjacet potestatibus. Some of the coins of the old Emperors have borne the in-

(k) 5 Jac. 3. c. 3. ap Seld Ib.

(l) Ap. Seld. Ib.

scription, *Victor Omnium, Gentium*; and a grave confutation of this entered upon by *Selden*, and by *Duck*, to prove their little claim to this splendid title. (m) Certain it is that *Bartolus*, a very learned Civilian, who has been called, *Magnum Jurisconsultorum lumen*, (n) asserted that this great Potentate was Lord of the world; (o) a position which, it should seem, was foolishly founded on those hyperbolical expressions concerning the "*Orbis Romanus*;" and "*Orbem jam totum Victor Romanus habebat*," to be met with in the Roman authors; and the expressions in *St. Luke's* gospel, that the Edicts of *Cæsar* should have authority throughout the world. *BARTOLUS*, however, thought himself so firm in his doctrine, that he says he would not hesitate to stigmatise the opposite opinion as an heresy. (p) Elevated with these notions, the fact certainly was, that the language of the Imperial Chanceries, in imitation of that of the antient Western Empire, affected to make the most eminent distinction between the *Empire* and other kingdoms. Europe was proudly divided into the various jurisdictions of *Germany, Gaul, and Italy*; *CHARLES the BALD*, upon being elected Emperor, ordered himself to be called "*Emperor of all the Kings lying on this side the Sea*;" (q) and however powerful or independent many of them might have been, the Imperial Lawyers, forgetting that things were different from what they had been, asserted their Master's prerogatives over them all. (r)

(m) *Id. Ib. Duck De Author. Jur. Civ. Rom. 2. 1. 4.*

(n) *Conring. De Imp. Rom. Germ. S. 5.*

(o) *Imperatores autem Romanos fuisse Dominos, non modo Provinciarum Orbis Christiani, sed et totius mundi, multi Interpretes nostri acriter contendunt. Duc De Author Jur. Civ. Rom. 2. 1. 2.*

(p) *Id. Ib. Duck De author. Jur. Civ. Rom. 2. 1. 2.*

(q) *Struv. Corp. Hist. Germ. Per. 4. S. 5. 5.*

(r) *Conring. ut sup.*

These prerogatives were often asserted with an actual view to the enlargement of the bounds of the Empire, and of the Sovereignty of its head; and it even *now* forms the ground-work of those state reasons which are used by the Ministers of Germany, in order to support their various pretensions.—Thus under the old Empire, *Ulpian* having observed that all the isles circumjacent to *Italy* formed a part of that dominion; his authority is quoted in form against the Venetians to uphold the rights of the German Roman Emperor over their state. Nor is this opposed by them upon the ground, that the Empire, having fallen to pieces, the kingdom of Italy, when conquered by Charlemagne, was different from what it had been when it formed part of the Empire; but merely by contending that *Ulpian* spoke only of islands that were inhabited, which was not the case with theirs at that time. (s)

Among these prerogatives also, during the power of the old Western Emperor, the salutation of the foot from all subordinate Kings had been always confessed; and so strangely infatuated was the German Monarch with the idea of his succession, that, so late as the fourteenth century, he endeavoured to exert his claim against the high spirited EDWARD III. at Cologne, in 1338. The answer of EDWARD is somewhat remarkable. Those Kings who held their titles from God alone; in other words, whose Sovereignty was supreme, were generally *anointed* with the Sacred Oil, in imitation of the antient Jewish Princes. What difference this can really make in the supremacy of a nation's authority, it is not of consequence here to enquire. It should seem, however, that our ancestors allowed of the Emperor's claim to the salutation of the foot, from all Princes *who were not anointed*, for Edward's answer was,

(s) Rouffet *Interets des Puiss.* de l'Eur. I. 162, 164.



“ Quod Rex Angliæ, Rex erat *inunctus*, et habet  
 “ vitam et membrum in potestate sua, et idcirco non  
 “ debet sese submittere tantum, sicut Rex alius *non*  
 “ *inunctus*.” (t) The Rex *non inunctus*, may therefore possibly answer to the Kings *Homagers* of Lord Coke, as mentioned above. (u)

Similar to the resistance of Edward III. was that of the Duke of Gloucester in the reign of Henry V. The Emperor Sigismund designing to visit England, arrived at Dover; but when ready to take the land, says Speed, the Duke of Gloucester and other Lords with their drawn swords entered the water, and thus spake to the Emperor; that if his Imperial Majesty intended to enter as their King's friend, they would receive him with all willingness accordingly: *but if as Emperor to claim any authority in England, which was a free kingdom, they were then ready to resist and impeach his entrance.* Which rough demand being most mildly answered by Sigismund, he had present access, and by them was attended towards London. (v)

Another prerogative of the antient Roman Emperors had been to create Kings at pleasure, a privilege indeed which was derived from the Republic herself; the most splendid exercise of whose power, was to dispose, almost wantonly, of the surrounding kingdoms. The new Emperors of the *West* therefore, contended also for the possession of this transcendent right, and it seems to have been allowed by all the Sovereigns of Europe without any contest. Accordingly, CHARLES the BALD is said to have created his brother-in-law *Rosin*, King of *Burgundy*, in order that he might assert this prerogative of his ancestors,

(t) T. Walsing. ap. Camd. Ang. Norm. 146.

(u) Vide also Selden T. of Hon. ch. 7. who seems to think that the ceremony of *anointing* kings was an indispensable mark of their Independence.

(v) Speed. 646.

(w) and appear to rule over kings; and despising the plain manner and habits of the Franks, he even began to affect the more splendid vanities of the Grecian Ceremonial. (x) *Pfeffel* enumerates in form, this right of creating Kings among the privileges of the Saxon, and apparently of the Franconian Emperors; (y) and in addition to the erection of the Kingdoms of *Hungary, Poland, and Bohemia*, (z) and an extension of royalty in the family of Denmark, (a) we find that so late as the fourteenth century the title of *King* was bestowed upon *Humbert, Dauphin of Vienne*, by *LEWIS of BAVARIA*. (b)

It has been supposed by a late French writer, that this right continued, and was exercised even at the commencement of the present century, when in 1701 the Elector of Brandenburg converted *Ducal Prussia* into a *kingdom*, and assumed the royal title; *LEOPOLD*, according to *Voltaire*, exercising in that instance, the right which the Emperors had always assumed of creating *Kings*. (c) From the accounts of the matter, however, which I have been able to collect, it by no means appears that the regal aggrandisement of *FREDERICK I.* was owing to this prerogative of the Emperor, but merely that having *himself* taken upon him the title of King, the Emperor was prevailed upon to acknowledge him first, and the rest of the

(w) Ut more prisicorum Imperatorum Regibus videretur dominari. Struv. Corp. 4. 5. 7.

(x) Id Ib. (y) Droit. Pub. D'Allem. 1. 192. 297.

(z) *Boleslaus*, Duke of Poland, received the title of king from *Otho III.* an. 1000. *Puffend.* Introd. 4. 243. *Pfeffel* 1. 164. *Ladislav*, Duke of Bohemia, was admitted to the same honour by *Fred. Barbarossa* 1157. (*Pfeffel* 1. 528.) and *Stephen*, King of Hungary, received his Crown from *Hen. II.* the honour of conferring it being shayed by the Pope in the beginning of the eleventh century. (*Heiss Hist. d'Allem.* 1. 65.)

(a) *Magnus*, Duke of Sleswick, was designed King of the *Ogotrites*, by *Lotharius II.* in the twelfth century. *Roussellet Int. des Puiss. de l'Europe.* 1. 236.

(b) *Pfeffel*, 1. 540.

(c) *Espr. des Nat.* 3. 208.

Princes

Princes of Europe were induced to follow his example. Such at least is the substance of the account given by the continuator of Puffendorf, (*d*) and Pfef-fel also affirms that the Emperor acknowledged the Elector as *King*, and the latter having ordered himself to be proclaimed, placed the crown upon his head with his own hands. (*e*)

The Proclamation made no mention of the Emperor, or Empire, but was simply, that as it had pleased Providence that the *Duchy* of Prussia should be erected into a *Kingdom*, and its Sovereign the most serene, and powerful Prince *Frederick*, had become its *King*, every one was given to understand the event by the said Proclamation. (*f*) *Lamberti* has detailed, somewhat at length, the account of this transaction; but though he observes that the Emperor's Ambassador was present at the ceremony; that he appeared well content that the new monarch should be called only King *in* Prussia; and sets forth the congratulatory letter of the Emperor to him, in which he denominates him merely "*Votre Dilection*," the title bestowed on *Electors*, and thanks him for having said that he would dedicate his new dignity to the service of the *Holy Empire*, and the Arch Ducal House of its Chief; yet it also appears, that the King styled himself in his circular letters, *Rex Borussiae*; that his Ambassadors received and returned visits *as such*; and that the letter at the same time that it congratulates the Elector in the fullest terms on his accession of dignity, makes *no* mention of the imperial prerogative which conferred it. Nothing indeed in the whole of the account is to be discovered on the part of the Emperor, evincive of his power in this particular, except some expressions of the *POPE* of an ambiguous nature, easily explained, and by no means

(*d*) *Introd. a l'Hist. Un.* 5. 29.

(*e*) *Dr. Pub.* 2, 465. 470.

(*f*) *Lamberti*, 1. 380.

amounting to positive evidence, while unsupported by other matter. (g) *Rouffet* indeed in one part of his work makes use of the words "Ayant accorde le titre a Frederick," but he immediately adds, "Ce Prince se mit lui meme la couronne sur la tete;" (h) and in another place observes that Leopold "reconnut cet Electeur comme Roi de Prusse, apres qu'il en eut pris le titre." (i) It is remarkable that the author of the *Memoires de Brandenbourg* himself, gives no insight into the transaction, as to the particulars of the imperial official interposition; which, had there been any, he surely would have done. He states only the treaty by which the approbation of Leopold was obtained, and observes the circumstance that the Elector crowned himself with his own hands. Putter also, when he comes to this event, contents himself with saying, that in order to procure a royal crown for the House of Brandenbourg, nothing farther was required, than to change the Dutchy of Prussia, *which was already independent*, into a kingdom; and that in consequence of certain terms agreed upon, Leopold promised to acknowledge the Elector in future, King of Prussia. (k) *Martens* says positively, that it is a mistake to think that the Emperor conferred the Royal Dignity upon the King of Prussia. (l) *Heiss* is the only writer that I have seen, whose relation of the transaction is any way in support of Voltaire's positive assertion. He

(g) Upon the ground that the erection of this new monarchy, was prejudicial to the Roman Catholic Religion, the Pope complained. "De ce que l'Empereur y avoit donne les mains, et avoit même en quelque maniere, *erigé* cette nouvelle Royauté." &c. *Lamberti*, 1. 383. The *quelque maniere* applies merely to any vague *instrumentality* of the Emperor; it does not at all imply exclusively the actual, and formal exertion of his prerogative, while there is strong presumptive evidence against it.

(h) *Rouffet*. Inter. des Puiss. de l'Europe, 1. 812.

(i) Id. 1. 245.

(k) *Putter*. 2. 387, 388.

(l) *Precis du Dr. des Gens*. 1. 155.

states,



states, that the Emperor wishing to shew some marks of gratitude to the Elector for services received, “ lui a *donne* la qualite de Roi de Prusse;” (*m*) a mode of expression, however, so little precise in itself, and so destitute of particular detail, that it can have little weight, while unsupported by any thing else, against that body of negative evidence which has been adduced.

I have been the more particular in this examination, because this statement of Voltaire, if not an error, would describe a very remarkable Constitution in Europe, and would attribute such supereminent prerogative to the Emperor, as no modern *supreme* King would willingly submit to. The Dutchy of Prussia was at that time an independent Sovereignty; (*n*) and could we suppose the right really to have existed, the same power might have given royalty to any other Sovereign. It is therefore the more likely to have been as we have stated it, that the German Monarch merely acknowledged the new dignity in his own dominions; and the rest of the European Courts confirmed it by degrees.

With respect to the prerogative as exercised in earlier times, it is to be observed, that although it was confined according to *Pfeffel*, to the vassals of the Emperor, and the learned *Selden* has therefore extended it to those only who were in “ Clientela Imperatoris”; yet from the strange confusion, formerly mentioned, which was made between the vast personal dominions and numerous potent vassals of the first *Kings* of Germany, and the territories and prerogatives which were actually conferred upon them, *as Emperors of the Romans*; it was often, nay generally, exerted in favour of persons who were wholly unconnected with the Empire, and dependent properly upon the *Kingdom* of Germany. This was

(*m*) Hist. de l'Emp. i. 352.

(*n*) Rouffet, i. 248.

the case in almost all the above cited examples ; but in the instance of *Hungary* a still farther usurpation was displayed ; since it does not appear that King *Stephen* at the time when he was received among the Crowned Heads of Europe, was at all dependent either upon the Empire, or the Kingdom, and it could only have been allowed in consequence of the ignorance of the age, the mistaken superiority of the name of *Emperor* over that of King, and the reverence which was paid in those times to the successors of the Monarchs of Rome. Upon the whole, however, it was one of the most brilliant prerogatives of the Imperial Crown. Whether it still continue, or, if it does, what rank in the estimation of other Thrones, such a created King would bear, I leave it to those who are more learned to determine. But at any rate I think that Kings thus created in “ *Clientela Imperatoris*,” could only be considered in the same light with the Kings *Homagers* whom Lord Coke, as we observed, so carefully distinguishes from Kings that are supreme.

This distinction may also serve to explain one or two remarkable circumstances in the old Constitution of Europe, which are visible at this day, but which have been differently accounted for by a very learned authority. Professor *Putter*, while explaining the circumstance that Bohemia forms a dependant state of the Empire with a Royal Title ; observes that according to the *present* Constitution of all Europe, no other King, considered in that quality, can be dependant, and it seems therefore almost a contradiction to say that there is a King of Bohemia, who, in that capacity, is a State of Germany. But, in antient times, when the public Law of Nations of the middle ages, did not consider it as an inconsistency for Kings to acknowledge their subordination to the Emperor, this might be thoroughly explained. (*p*)

(*p*) *Putter. Constit. of Germ.* 2. 394.

Now

Now with very great deference for his authority, although we have set forth many of the privileges claimed by the Emperors over other Kings, yet as the Kings, who were supremely independent, generally refused to allow them, (as in the case of Edward III. above cited,) this phænomenon of Bohemia in the present Constitution of Europe, may, I think be better explained, by the foregoing distinction made between the antient Thrones, and the prerogative universally allowed to the Emperor of conferring an *inferior* kind of Royalty upon his Vassals. This inferior kind of Royalty might be conferred even by other potentates, who were themselves supreme. At least I find one instance of it in our own history, when, in the reign of Henry VI. Henry Beauchamp, the last Earl and first Duke of Warwick of his name, was crowned by that Monarch King of the Isles of Wight, Guernsey and Jersey. (q) Now it is of no consequence to say that the power of such a King was so circumscribed as scarcely to be known in Europe. The right was the same, and had the line of Beauchamp been continued, or from any acquisition of force, (for example in the civil wars which followed,) could he have been led into any connections with other Sovereigns on the Continent, a question might fairly be raised, whether the Royal title of this dependant State, composed of the Isles of *Wight, Guernsey and Jersey*, would not have been recognized by all other powers? In the same manner

(q) Leland's Itinerar. Selden Tit. of Hon. ch. 3. Heylin's help to Eng. Hist. voc. Warwick. It is rather remarkable that this event should not be in Dugdale's Baronage. It is true that Lord Coke observes that "as some do hold," the King had not power by the law of the land to create the Duke of Warwick King, because there could not be two Kings of the same country at a time. 4th Inst. 287. But, sua pace, his own distinction between Homagers and Supreme, might explain this, and it is to be remembered that the power to create the title, is the sole point of discussion.

in more antient times, many of the inferior Kings of Spain were acknowledged to be such, though *Homagers* to the greater potentates of that country; and many also of the Heptarchy in England, though dependant upon him who was called the *Rex Primus*; a title enjoyed by many of them before Egbert. (r) Lastly, the King of *Man* seems, though the head of a very dependant State, to have been as *legally ROYAL*, as the King of *Bohemia*. For he subscribed himself by that title, received it from his superiors, and had an allowed right to a crown of gold. (s)

Hence, therefore, Sovereigns that were dependant upon other States, being allowed to assume the Royal Title, as well as those dependant upon the Empire; the circumstance that the subordinate State of *Bohemia* is a Kingdom, is neither *necessarily* owing to this antient European Law of Nations, concerning the prerogatives of the Emperor; nor should it seem, that it is even *now* impossible for any other dependant State, to bear the title of a kingdom.

With respect to the erection of new Kingdoms in the present day, this privilege of the Emperors, which was shared as we have seen by the Popes, is at least grown obsolete, if it can be supposed at all to remain. Every independent Nation or Sovereign, has a right to assume what title it pleases, and it will depend upon the accidents of Convention with other

(r) Selden. ch. 3.

(s) Vide T. Walsing, ap. Camden Angl. Norm. 350. Edit. 1603. "Wilielmus Scroop, emit de Domino Wilielmo de Mortuacuto, &c. Insulam Euboniæ cum corona. Nempe Dominus hujus Insulæ Rex vocatur, cui etiam fas est corona aurea coronari." So also a MS Chronicle, quoted by Selden, probably, however, copying this passage, affirms, "Est nempe jus illius Insulæ, & quis-quis illius fit dominus, Rex vocetur, cui etiam fas est corona aurea coronari." Selden says the MS. is in the library at Oxford, cui sciolus aliquis. nomen Guil. Rifsangar temere nuper prefixit an. 1392.



States, of interest, or of necessity, whether, or with what modifications they shall be allowed. (t)

Having thus attempted historically to trace the revival of the Western Empire, and the rights and prerogatives to which its Monarchs in consequence pretended; I shall now endeavour to investigate the real nature of the Imperial Dignity as it formerly stood; and more particularly to remark upon the close and not incurious affinity, which it has long been held with a particular kingdom, between which and itself there was no original, or *necessary* connection.

Many have supposed this to arise from a circumstance not founded in fact, namely, that the territories of the German Monarch were the *genuine* remains of the old Empire, and that the German and Imperial crowns were therefore *necessarily* the same. This opinion continues in some measure to be a vulgar error to this day; in former times it was often started, as the sound legal doctrine of the Law of Nations in Europe, and so late as the last century, *Hermannus Conringius*, a celebrated German Jurist, found it necessary to go at length into the question, which he has ably and elegantly done in the Treatise under his name extant upon the subject. (u) With respect to the mere Kingdom of Germany, however, it is well known that the greater part of its provinces, north of the *Danube*, were never subjugated even by the most successful Conquerors who swayed the Roman Sceptre; and small indeed therefore could be the pretensions of its Monarchs to be called the legitimate representatives of those illustrious despots. The extended domination of CHARLEMAGNE, had indeed a far better title to this honour; but, as

(t) Vide Martens *Precis du Droit des Gens*. 155.

(u) Vide the *Discursus novus de Imperatore Romano Germanico*; and see also Duck. *De Ufu et authoritate Jur. Civ. Rom.* L. 2. C. 1.

was formerly observed, it was the remarkable circumstance that he was *personally* though by *different* title, in possession of a great proportion of the old Western Empire, which gave rise to the idea that that mighty and identical power had really revived in his person; and that the assumption of the Imperial dignity was nothing more than the *regular consequence* of such a dominion. Hence arose all those extravagant doctrines, and the hyperbolical positions of Bartolus formerly alluded to, which Conringius with indignation considers to be the tenets, "Vel indocti hominis, vel impudentis." (v)

The account of this matter need be very short. The Romans had acquired their dominions in the same manner as other nations; and as they acquired them, so they might lose them. Province after province had been torn from them, by men as independent as themselves; and *Italy*, the chief of them all, had been ceded by the remaining *legitimate* empire in the *East*, to THEODORIC, King of the *Ostrogoths*. It was then again conquered *for the Eastern Empire* by BELLISARIUS and NARSES, and again lost to the *Lombards* and *Germans*. With respect to the other component parts of the Empire, they had long been torn asunder in the course of various revolutions, and were held, with a prescription of three hundred years in their favour, by Sovereigns wholly unconnected, and wholly independent of any Roman people that might be supposed to exist. In this state of things, it happened *adventitiously*, that CHARLEMAGNE, the greatest Monarch of the West, united, in his own person, many, or most of those Sovereignties which had formerly composed, but which were now independent of the old Empire. He held *Gaul* by hereditary succession; *Germany*, part of

(v) De Imper. Rom. Germ. S. 6.

*Spain* and *Lombardy* by conquest; (*w*) and though *Lombardy* included great part of Italy, yet it had long *passed out* of the Empire into the hands of an independent King; and from him, being conquered by another independent King, it could not be said either to revive as the old Empire, or to confer any rights upon its new master which it had not possessed before. It was after all these revolutions, and the acquisition of such various sceptres in his own person, that CHARLEMAGNE gave liberty to the remnant of the Empire, *existing in the City of Rome, and a few Italian States*, by whose free election he acquired all which they could confer, namely, the Sovereignty over themselves, and the old Imperial title, which they alone, by a kind of *Postliminium*, as it seems to be allowed, had the right to create. (*x*)

The new Emperor, however, thus elected, did not disdain to receive confirmations of his dignity from whatsoever quarter they could arise, and was not sorry, by an exchange of Embassies with the Constantinopolitan Court, (where, it is to be recollected, the old real *Eastern* Roman Empire still existed,) to find his title acknowledged by those who alone could have had the semblance of a right to resist it. Hence therefore it has been supposed by a writer of authority, that he held the Empire by three titles; first, by actual possession; secondly, by free election; and thirdly, by compact with the Eastern Empire. (*y*)

(*w*) Struv. Corp. Germ. Hist. Per. 4, S. 1. 12.

(*x*) Dein ex declaratione Romanorum qui quasi pro derelicto habiti, ex jure postliminii jus declarandi Imperatorem sibi iterum vindicarunt. Struvius. Corp. 4. 1.

(*y*) Struvius. ib. See also Duck. De Author. Jur. Civ. Rom. L. 2. C. 2. "Et cum Nicephero, *pactionem* inivit ut Occens cum Constantinopoli Græcis Imperatoribus, occidens, cum Româ Carolo et ejus posteris cederet.

It appears then that it was the people of *Rome* who properly conferred the Empire, and from whom that dominion continued ultimately to be derived; although, from changes in the constitution, as we shall hereafter see, the channel of power was also changed. In the successions immediately after CHARLEMAGNE, election by the Senate and the Pope, and coronation and consecration by the hands of the latter, seem to have been indispensable to the *legality* of the title. Nor can we here pass by a very remarkable addition to the style of the new Sovereign. By the constitution of the old Empire, it is known that, however despotic the Roman Sovereigns were, they studiously avoided the name of *King*; and their power seems to have arisen not so much from the sole integral office of *Imperator*, as from an union, in their own person, of all the offices of the commonwealth. Hence they were *Imperators*, *Consuls*, and *Tribunes*, at the same time. Now it is worthy remark, that CHARLEMAGNE, having probably this custom in view, calls the first year of his reign over the Romans, *the first year of his Consulate*; (z) a circumstance which may serve to throw light upon the real nature of this new constitution.

Upon the whole, then, the new Monarch of the West held almost all his different possessions by distinct and different titles; nor could any of them, save Rome and its few dependancies, be considered as the *Empire*, merely because they were governed by the same person, unless an actual incorporation of them all had taken place. (a) This, however, ne-

(z) Sigonius de Reg. Ital. L. 4. His style was, "Carolus, divino nutu coronatus, Romanum regens Imperium, Serenissimus Augustus, &c. anno regni nostri in Francia xxxiii. in Italia xxxviii. *Consulatus autem nostri primo.*"

(a) Igitur aut inani cum titulo est affectus Carolus, aut si quid accepit, illa quæ in Italia, *extra* Langobardicum Regnum erant. Conring. De Imp. Rom. Germ. S. 26.



ver was attempted, and CHARLEMAGNE, in the account of his other titles, was known to stile himself, (as in his Charter to the Bishopric of Osnaburg,) AUGUSTUS; Romanum gubernans Imperium; Dominus & Rex Francorum, et Langobardorum; Frisiorum Dominator, et Saxonum. (b)

CHARLEMAGNE associated his son Lewis in the Empire, and dying in 814, LEWIS succeeded to all his dominions, and held them by the same title as his father. It was the third generation that evinced the nature of the constitution. LOTHARIUS, the eldest of the sons of LEWIS, was also associated with him in the Empire, and succeeded on his death to the Kingdom of Italy. But neither did he carry along with him the whole of his father's territories, nor were the sceptres which were swayed by his brothers, (in Germany by LEWIS, and in France by CHARLES,) to be considered as dependant sceptres, subordinate to the Imperial diadem. On the contrary, when he claimed to be superior to his brothers, in right of primogeniture, and of the Empire, they contended "quod LOTHARII fratres erant, et sacramento regnum inter illos divisum fuerat, et illi genere, nec potestate inferiores erant." (c) LOTHARIUS, not content with this reasoning, attacked the Kings of Germany and France, and fought the famous battle of Fontenay in 841, where being entirely defeated, it was settled by the treaty of Verdun 843, that the Kingdoms of Germany and France should thence forward be for ever disjoined; a settlement which, in general, is regarded as the true epoch of the entire separation of those realms. (d)

LOTHARIUS followed the example of his father and grandfather, in associating his son LEWIS in the

(b) Id. S. 31.

(c) Hincmar. Epist. ad Ludov. Balb. ap. Conring. 33.

(d) Pfeffel l. 59. Putter l. 7. Conring. 34. Sigon De Reg. Ital. l. 5.

Empire, which, *still confined to the limits of a part of the Italian States*, was again, upon his death, dissevered from the rest of the possessions that had been held along with it. LEWIS II. succeeded to a powerful Throne; and a new kingdom (of *Lorraine*) was created for his younger brother, LOTHARIUS. Upon the death of LEWIS II. without heirs male, CHARLES the BALD, King of France, succeeded by *election of the States of Italy*, (e) after a contest with his nephew, CARLOMAN, son to the King of Germany. He dying, another contest arose between his son, LEWIS the STAMMERER, of France, and the same CARLOMAN, who by this time was King of Italy, but *not* Emperor. Some pretend, that the latter was elected into the Imperial Throne; but others again assert, that LEWIS was consecrated by the Pope, JOHN VIII. at TROYES; a doubtful and uncertain election! Be this as it may, the Empire was next conferred upon CHARLES the FAT, King of Swabia, youngest son of LEWIS I. King of Germany; and it was the fortune of this Prince to reunite in his own person almost the whole of CHARLEMAGNE'S dominions by succession. After his death, many difficulties arising from the disputed legitimacy of CHARLES the SIMPLE, the last branch of the *Carlovingians* that remained in France, ARNOLPH, a bastard of Carloma, was elected King of Germany; but the Kingdom of Italy (always hitherto distinct from the Empire) was disputed by BERENGER, Duke of Milan, and VIDO, or GUY, Duke of Spoleto. It was possessed by both for some time; (f) but at length VIDO overcame his rival, and was afterwards elected Emperor of the Romans, crown-

(e) Pfeffel. i. 68 Struvius, upon the authority of the Annals of Fulda, asserts that it was by bribery of the Senate, which at least shews their power of electing. *Omnem Senatum populi Rom. corrupit.*

(f) Baron. Annal. 892. Sigonius. L. 6.

ed by the Pope, and *associating* his son LAMBERT in his dignity, the latter was also crowned. BERENGER, flying for assistance to ARNOLPH, the latter took that opportunity to interfere in the affairs of Italy, and marching to Rome, (GUY being by this time dead,) was himself crowned Emperor, (g) and enjoyed the title till his death. Upon that event, the Kingdom of Germany went to his son, LEWIS III. who died without issue in 911, and with him ended the whole of the Carlovingian race in Germany; but the *Empire* seems next to have passed to LEWIS of PROVENCE, King of Burgundy, who obtained it by an election of the Romans; and after him it fell to BERENGER, King of Italy, the Kingdom of Germany still going on in another line, as will immediately be shewn.

The death of LEWIS III. thus left the throne of Germany vacant, the nation still resolving to pass by CHARLES the SIMPLE of France, either on account of his illegitimacy, or his imbecility; and, in this emergency they proceeded to a fair and free election of a Sovereign worthy to reign over them. The choice fell on CONRAD of FRANCONIA, who dying without issue, they elected HENRY the FOWLER, and after him, his son, OTHO I. or the Great, who once more brought back the Imperial dignity into the family of Germany, and fixed it there for ever.

That dignity had, in the mean time, been restored to LAMBERT, the *Associate* of his father, GUY, (h) and afterwards was conferred, as above-mentioned, upon LEWIS of PROVENCE. It then continued at the mercy of such of the tyrants of Italy as could make themselves masters of the Bishop and Citizens of Rome, from whose choice and consecration it was still supposed exclusively to arise; and so various was the success of these pretenders, and so

(g) Struv. Corp. &c. 4. 8.

(h) Sigon. L. 6.

completely had the Kings of Germany seemed to have lost sight of this dignity, (supposed to be so closely united to them,) (i) that Gibbon has imagined the real Western Empire to have been actually *vacant*, during a period of seventy-four years. (k) This opinion was founded, no doubt, upon the same grounds which have drawn an assertion from *Conringius* that the remains of the Roman Empire were at this time totally disjoined from the kingdom of Germany, and for the most part without an Emperor at their head.

All this being understood, I know not from what documents of history many authors have chosen to consider all the Kings of Germany from the time of ARNOLPH, as *Emperors*. We have shewn that Germany, taken by itself, was nothing more than a Kingdom. and that its Monarchs could only be reckoned among the Emperors when they were *elect-ed* to the Imperial Dignity by the Romans, and actually crowned at Rome by the Pope: yet the whole course of Heiss's History describes the German Sovereigns as Emperors; under which, therefore, he classes LEWIS III. son to ARNOLPH, CONRAD of FRANCONIA, (who had no connection with Italy at all,) and HENRY the FOWLER, father of OTHO, who was only *invited* by the Pope to take upon him the Imperial Power, but never passed through the forms of election. *Heiss*, however, is not consistent even with himself; for though he relates, that upon the death of CONRAD, the Nobles elected HENRY to the *Imperial* Crown; yet he adds immediately afterwards, that the Pope offered to declare him *Emperor of the Romans*. (l) It is evident, therefore, I think, that he confounds, and very impro-

(i) Conringius calls Germany, at this time, "*Distinctam et sui Juris Remp.*" S. 34.

(k) Dec. & Fall. Ch. 49.

(l) Heiss. Hist. de l'Emp. L. 2. C. 2.



perly, the *Regal* title of *Germany* with the *Imperial* one of *Rome*.—*Puffendorf* also reckons LEWIS III. CONRAD, and HENRY, among the *Emperors*, only observing that the affairs of *Germany* were in so bad a state, that they could not attend to *Italy*. (m) But, according to us, they had no right to concern themselves at all with *Italy*; and when *Puffendorf* himself comes to OTHO, he speaks of the *Empires* of *Germany* and of *Rome* as distinct, although the former, taken by itself, was never, as we have shewn, properly to be called an *Empire*. Dr. Blair, in his *Chronological Tables*, enumerates Lewis, Conrad, and Henry, in the list of the same Monarchs, although with more consistency, and dropping the title of *Emperors* of the *West*, he here actually calls them *Emperors* of *Germany*. The author of the *Letters on Modern Europe* pursues the same account; and lastly, *Robertson*, who was led by his subject to the particular investigation of this matter, chuses also to consider *Germany* as the *Empire* before OTHO, and to rank HENRY among the *Emperors*. The first notice indeed which he takes of the *Roman Imperial Title*, commences with the transaction of OTHO; and from the very short account of this remarkable Throne which he gives, it should seem almost, that that Monarch had been the first in the world, (and that, without shewing his right,) to receive it. “Elated with his (*Otho's*) success,” says this celebrated historian, “he assumed the title of CÆSAR AUGUSTUS. A Prince born in the heart of *Germany*, pretended to be the successor of the *Emperors* of antient *Rome*, and claimed a right to the same power and prerogatives.” (n)

On the other hand, *Gibbon* confesses that it is the power of custom alone which forces him to rank

(m) *Introd. à l'Hist. Un.* 3. 2.

(n) *Robertson*, Ch. v. l. 209. Surely this must be deemed a very unsatisfactory account of a matter so important.

Conrad and Henry in the list of Emperors ; a title, he observes, never assumed by those *Kings* of Germany: (o) and *Baronius*, *Sigonius*, (p) *Struvius*, and *Pfeffel*, (q) authors of high authority in antiquities which came almost professionally before them, assert positively that LEWIS of Provence succeeded ARNOLPH in the Empire, and after him, BEKENGGER, and various others of the *Italian* Princes, till the election of OTHO. They therefore reject Lewis III. Conrad, and Henry ; and Struvius, in particular, makes a regular question in every one of the sections concerning them, whether they were Emperors of Rome, or only Kings of Germany ; and he decides in favour of the last. (r)

From all this it will appear, that the designation of EMPEROR OF THE WEST, from the time of its revival under CHARLEMAGNE, was in reality a floating title, by no means affixed to any particular Kingdom, but liable to be given to the Chiefs of any State that could acquire it by election ; of course, that neither *France* nor *Germany*, *Burgundy* nor *Lombardy*, had any *exclusive* claim to it, by virtue of any supposed representation of an Empire to which they had long ceased to belong, and to which, if they appeared to be reunited, it was simply by the adventitious circumstance that they were governed

(o) Decl. and Fall. Ch. 49.

(p) Ut sup.

(q) Dr. Pub. D'Allem. i. 98.

(r) Imperator vero dici nequit, (*Ludovicus III.*) dum nondum Germanis in hanc dignitatem jura essent, nec Italiam possiderit quam isto tempore tenebat *Ludovicus Bosonis filius*, et hoc ejecto *Berengarius*, nec a Papa esset coronatus. Corp. Hist. Germ. 4. 9. Again, after saying that the Germans elected Conrad King of Germany, he asserts, "Imperator autem dici, nulla ratione poterit, dum " nec Germani adhuc jus haberent in Imperium " Romanum nec ipse a Romanis vel evocatus, vel in Imperio " fuerit coronatus." Id. S. 10. So also, after examining the title of Henry to the Empire, he concludes, "Fuit igitur Henricus, Rex Germaniæ, non vero imperator." Id. S. 11.

by the same Sovereign ; in the same manner as our own Kingdom, and the Electorate of Hanover, are governed by one Monarch, without coalescing into one and the same state. Perhaps it may even be fairly supposed that this dignity was actually not hereditary in the *Carlovingian* family ; for if it had been so, the descent would no doubt have been governed by some certain rule ; but from the circumstance, formerly mentioned, that CHARLEMAGNE had revived the old Roman Constitution, in styling himself *Consul of Rome*, it should seem that he had not these ideas of it himself ; and we may observe that, invariably, in the four instances recorded, where the sons succeeded immediately to their fathers, they had been previously *associated* in the Empire. In all other cases, the fact appears to have been, that whoever got first to Rome, and acquired the voices of the Senate and the Pope, was honoured with the contested title ; and a confusion was thus made between the uncles, cousins, and nephews of the last possessor ; between his kinsmen claiming through the male, and through the female line. It is probable, therefore, that the same right which could *alter* the succession by election, could have set aside the whole family ; nor is it of any consequence that *all* the Emperors before OTHO, were of the family of CHARLEMAGNE, the power of that Monarch having been so vast, and his posterity so numerous, that not a Throne in Europe but was descended, either collaterally or lineally, from his blood.

This then being understood, I shall now proceed to point out how and when it was that the Germanic Kingdom and this celebrated Empire, illustrious even in its remains, came to be really united ; that is, when they came to form one incorporate body, so as to exclude all chance that the Imperial Dignity should again be bandied about from Kingdom to Kingdom, as had been the case from the time of LOTHARIUS I. to OTHO.

It was done by actual Convention between the Romans and their Bishop, Pope ADRIAN III. and the last mentioned Monarch, who like CHARLEMAGNE crossed the Alps to deliver the church, and like him reaped the Kingdom of Italy and the Imperial Crown for his reward. The cruelty and oppression of the various tyrants of Italy, had made such of its States, as avowedly represented the old Western Empire, eager to search for deliverers among the most powerful of the neighbouring Princes: and as none during their time could be compared to OTHO in real strength or firmness of character, the citizens of Rome were willing to confer upon him the illustrious Sovereignty. Stimulated by this, and the hopes of the Kingdom of Italy, enjoyed by the tyrant *Berenger*, the King of Germany twice passed the Alps, and having finally overthrown the power of his opponent, he was not only elected King of Italy, and Emperor of the Romans, but it was decreed that those dignities should for ever be annexed to the Sovereignty of Germany, to be enjoyed by whomever the Nobles of that Kingdom, who had the power of election, should chuse to appoint. A remarkable Constitution! which, however, has continued to this day, and is the true foundation of the strict incorporation of the German and Roman powers. Accordingly, from this time it was, that the Sovereign of Germany, omitting the enumeration of his distinct and various titles, subscribed himself simply EMPEROR OF THE ROMANS; an alteration which gave birth to the belief, that the dominions governed by the Roman Emperor, must be the Roman Empire itself. (s)

But

(s) Conringius. 39. Putter B. 2. ch. 3. In fixing this important transaction, I have chosen to follow Pfeffel, although other Jurists (as Putter) have asserted, that OTHO I. only annexed the empire to his *family*, not to the *Crown of Germany*, and that it



But although the two Sovereigns are now so closely united, that the Chief of the one, must necessarily be the Chief of the other at the same time; yet even this union it should seem, is not so strict, but that they may be still considered as distinct Sovereignties. That is, they are not so blended together as to form but one body, as the kingdoms of England and Scotland; which, for example, are, as it were, annihilated, and a new Kingdom of Great-Britain substituted in their places. The Empire of Rome, and the Kingdom of Germany are still in existence as such; long after OTHO I. three different Crowns were worn by the German Monarch, namely, the Imperial, the German, and the Lombardic; and to this day, his titles are carefully kept distinct, he being stiled not Emperor of Germany as is vulgarly supposed, but elected Roman Emperor, and King of Germany. (t) Thus, according to Conringius, “aliud sit esse Regem Germaniæ, aliud electum Cæsarem Romani Imperii.” (u) And with this we shall close this complicated subject.

was under his grandson OTHO III. that this new constitution was settled. Putter's only account, however, is, that it was so to all appearance. (B. 2. ch. 3.) while Pfeffel produces on his side, the testimony of *Luitprand*, Bishop of Cremona, (a well known historian, and himself the Emperor's Representative at the Council of Rome where the business was settled :) and the confirmation of *Éves de Chartres*, and *Waltram de Naumbourg*, two eminent Canonists, who rely upon it in the eleventh century, as true. *Droit Pub. d'Allem.* 1. 142.

(t) Dillon's account of the Rom. Emp. p. 8. Putter. B. 4. Ch. 4. The title of elected Emperor was assumed in consequence of a Convention between Maximilian I. and Pope Julius II. The former wishing to be crowned at Rome, 1508, the Pope who desired not to see him in Italy, declared of his own accord that the ceremony should in future be dispensed with, provided that Maximilian and his successors should style themselves *elected* Roman Emperors, which with the reassumed title of King of Germany, has been the custom ever since. Ib.

(u) Conring. S. 40.

The

The claims to Sovereign Dominion as Emperor, the detail of which we have been giving so much at length, have however, now gradually worn away before the lights of modern ages; and nothing is now left him but the precedence before all European Monarchs, except the POPE. (w)

Even this also has been constantly contested by the Turkish Emperor, who, probably founding his claim upon his succession to the antient Greek Empire, (x) insists upon an entire equality with the German Sovereign; and this was at last allowed and put out of doubt, by the Treaty of Passarowitz, 1718, and that of Belgrade 1739. (y)

Possibly it may at first appear irrelevant, in a treatise which regards a whole *Class* of Nations, to have been so long upon points that relate solely to a particular Kingdom. When however it is considered, that the precedence of that Kingdom has become part of the Law in Europe, in virtue of a very remarkable succession to a throne with which originally it had no connection; that this throne itself had in former times, sent forth other pretensions which concerned almost the whole world, and which depended upon a variety of minute and curious circum-

(w) Mackenzie 1. Temple's Mem. 1672. 1679. So late however, as the Congress of Nimwegen, he pretended to something more than the first place in the same rank. At that Congress the Ambassadors of all the other belligerent powers, yielded, according to the custom, to the *Mediators*. The Emperor's, however, affected *Equality*. They also treated the Ambassadors of *Electors*, with the same honour as those of crowned heads, with the view, says Temple, as his own superiority above *them* was confessed, to infer a like superiority over the others—"for the Emperor pretended to a difference of *rank*, as well as of *place* from all other Monarchs, the last of which only was allowed." Ib.

(x) Et Sultani Turcici vane asserant se esse Successores Constantiniani Magni in Imperio Romano. Duck. du Author. Jur. Civ. Rom. L. 2. C. 2. 4.

(y) Martens. *Precis du Droit des Gens*. 1. 160, 161.

stances,

stances, the investigation of which leads deep into the antiquities of a particular constitution; it will probably be deemed even more than pertinent to have gone as we have done into the enquiry. For it is one of the profest objects of this work, to endeavour to *account* for things which have been wholly passed by, or but slightly mentioned by those other Treatises on the Law of Nations which are now in use. (2)

The next doctrine concerning precedence, as *admitted* by the Nations of Europe, which I shall mention, is that by which all countries under *Republican* forms of Government, were held to be inferiour in rank to Monarchies. Of all other received maxims, perhaps, this was one of the most unjust, and the most destitute of reasonable support; it being scarce-

(2) *Mackenzio*, though he wrote expressly on the precedence of Europe, contents himself with saying in general terms, that the Emperors of Germany succeeded to the Roman Emperors, without shewing how, or taking any notice of the chasm of 300 years between the two. Vattel (probably despising the subject) when he comes to speak of the precedence of the Emperor, is far from being ample enough or even satisfactory in what he does advance. He says merely, (Dr. des Gens. 2, 3. 40.) that the division in the house of Charlemagne, having given the Empire to the eldest son, the younger who had France, yielded to him, in place, and the more easily *qu'il restoit encore dans ce tems la, une idée regente de la Majesté du veritable Empire Romain*: that the successors of the King of France followed the custom which they found established, and that they were imitated by other Kings. He thus passes by the whole rite and constitution of the Imperial Dignity: what was really to be understood of the "*idée regente du veritable Empire*" (a mode of expression which would lead one to suppose that it was soon afterwards lost;) the circumstance that the King of Germany was younger brother to the Emperor after the division, as well as the King of France, and, above all, what it was most material to observe, the Convention between Otho I. and the Romans. He afterwards observes that the other crowned heads are not agreed as to rank, and this is all which he brings forward concerning a subject of serious importance during those times, the law and custom of which it is our object, as far as we are able, to detail.

ly possible to conceive, when it is the *Independence* and Sovereign Dignity of a Nation which are to be represented, what alteration can be produced in them by a difference of Constitution. The Sovereignty of every State must be somewhere lodged, and *quoad* that Sovereignty, (taken in the abstract *as such* without reference to its component parts,) it matters little, with respect to foreign Nations, whether it is possessed by one man, or by many, by hereditary descent, or by election. And as all Nations, that are purely, and equally Independent and Sovereign, must be equal in rights among one another, and the Governments of Nations, whether Monarchical, or Republican, are their only Representatives; the common sense upon the subject is, plainly, that the Governments of Nations are also equal, in respect to one another. There can therefore, fairly, be no difference in point of rank between States, drawn from the nature of their various constitutions. It has been well said by *Grotius*, that so long as a people are not absolutely annihilated or dissipated, their exterior duties must remain the same, in spite of every change in their Constitution that can possibly happen; and thus that the debts due by one free nation to another, are not the less due, because a *King* is imposed upon them. (a) But if this is the case with respect to duties, it must also be so with respect to rights; and if equality of place, be the right annexed to equality of Independence, an Independent *Commonwealth* should be equally high in the scale of pre-eminence, with an independent *Monarchy*. Our ancestors however judged otherwise, and in spite of the plain reason of the case, the fact is certain, that *Monarchs* claimed, and were allowed the precedence before *Commonwealths* in every part of Europe. (b)

(a) D. J. B. et P. 2. 9. 8. 2, 3.

(b) Vattel, 2, 3. 38. Mackenz. 26. Martens Prec. du Dr. des Gens, 1. 160.



That this was the known custom, is sufficient to induce us to record it, and the reason for it may probably be ascribed to two causes.

I. In all cases where precedence could come into question, the contest could only be conducted by the executive Governments of the people concerned, or their representatives; and men, particularly in times when the true principles of Government were ill understood, did not, in all probability, look farther than the *persons* of their antagonists. In this case, there could be no *personal* Equality between a Monarch, possessing, perhaps, an undivided Sovereignty, and deriving his authority to contend, solely from himself; and a council of men, whose authority was probably not permanent, or was dependant upon others, who again, perhaps, might look to powers still farther removed, for the dignity of their stations. In earlier times also in Europe, *Commonwealths* were absolutely new, in comparison with the antient dignity of King; and the directors of *Republics*, were possibly elevated to their power in the very memory of the Sovereigns, to an equality with whom they pretended. It was not therefore surprising, though the matter was certainly not well understood, that the opinions of men made a distinction between them. If the contest was between *Ambassadors*, this reasoning would be brought into a shape almost palpable; for *Ambassadors* being supposed to represent the very *person* of their employers, (c) the Ambassador of an *Emperor*, might not unfairly, upon this idea contend for precedence before an Ambassador, appointed perhaps by a Council or Committee, composed of private individuals. Up-

(c) Those who are acquainted with the nature of the divisions of the diplomatic character into Ambassador, Envoys, Residents, &c. or, as it is arranged, into Ministers of the first and second order, will easily understand this.

on the same principle it probably also was, that an *Elective King*, was considered for a long time, as inferior in dignity to one, who derived his rank from a long line of ancestry, and a throne of old time established in his family. (*d*)

II. The reason for the pre-eminency of Monarchies in former times, was drawn, in all probability, from the doctrine, not then exploded, of the divine right of Kings; which, *wherever it was allowed*; would carry it, beyond question, from those who were supposed to hold their power by a less noble tenure. It was this also, without doubt, that produced the difference formerly touched upon, between Kings that were anointed with the sacred oil, and those who exercised the functions of a Sovereign, but who were not supposed to possess them in their full and undivided supremacy.

This precedency of *Monarchs* before *Commonwealths*, has been so universally received in modern Europe, that two only of the latter have ever been allowed to rank with the former. These are the illustrious Republics of *Venice* and *Holland*, the first of which, however, originally enjoyed this privilege, more in virtue of possessing the Kingdom of *Cyprus*, than on account of its power or reputation. (*e*) Even the celebrated Republic of *Genoa*, whose riches and fame were such, as to acquire for her the appellation of “*SUPERBA*,” could never attain to this contested honour. In the war of *Candia*, so adverse to Venice, it offered that rival Commonwealth considerable succours of men and money, for the honour of being treated by her on terms of *Equality*, but the offer was refused with contempt. (*f*) It is said also to

(*d*) Mackenz. Molloy de Juv. Mar. 99. Winwood's Memorials, 2. 70.

(*e*) Wicquef. De l'Ambass. 1. 350. Mem. touch. les Ambass. 345. 347.

(*f*) Amelot de la Houss Hist du Gouv. de Ven. 1. 114.

have been ready to advance millions, for the privilege of receiving audience by their Ambassadors at Rome, in the *Sala Regia* instead of the "*Sala Ducalis*" to which the watchful rivalry of Venice, proceeding upon the known customs of Europe, had always obliged the Pope to confine it. (g) At the same time, it should seem that even this equality in *Venice* with crowned heads, was in some measure qualified, since the *Venetian* Ambassadors, when order, or procession was concerned, took rank only next to the Ambassadors of kings. (h)

Venice was sole in the enjoyment of these honours among Republics, till the rise of the Belgian Commonwealth in the last century, which, having attained to independence and considerable power, claimed, and acquired the same rank. The claim came on in the shape, not of pretensions to rank immediately with crowned heads, but simply to be treated as the equal of *Venice*, which was peremptorily insisted upon in the instructions from the Prince of Orange to the Dutch Ambassadors at Munster, 1645, and from that time has been universally allowed. (i)

With respect to other Republics, various have been the competitions between them, which as they proceeded upon the same reasons as those we have already detailed concerning precedence in general, we shall not farther touch upon; contenting ourselves

(g) Id. Ib. & Wicquef. 1. 230.

(h) Mem. touch. les Ambass. 345. Vattel. 2, 3. 38. At the Court of James I. of England, on the occasion of the Palatine's wedding, a contest concerning an *invitation to supper*, arising between the Ambassadors of the Arch Duke and the Republic of Venice, the former observed that his master would never allow "so much as a question or thought of a competition between him, a *Monarchall Sovereign*, and a meane *Republique*, governed by a set of *Burghers*," Finet. *Puntillos and Contests of Forren Ambass. in England*, p. 3.

(i) Mem. touch. les Ambass. 524.

with

with referring those who may be curious upon a subject, which is merely curious, to such authors as have made it more immediately their object to record them. We cannot however conclude this part of our discussion, without agreeing in the remarks of Vattel upon it, that no real difference ought to take place as to rank, between Commonwealths and Monarchies; and that the distinction which has actually been allowed, can only be deemed an *usurpation* of the latter, founded on the right of the strongest.

(k) In antient times, when the features of Europe were reversed, and *Commonwealths* were the greatest powers known, the *Monarchies* then in existence, were considered as inferiour in dignity, and few Roman Noblemen, but would have spurned at the idea of entering into the balance with the first Kings of the world. Certain at least it is that this part of the jurisprudence of the Western Nations, even in modern times, depended so much upon *power*, that when the faction of *Cromwell*, had born down all that was good and great in the realm of England, and had imposed upon it a nominal state of Republicanism, the power and weight of the country obliged all other states to allow, in matters of punctilio, the full rank and precedency which she had before enjoyed. (l)

These are the great points which seem to have been determined in the ceremonial of Europe, concerning the rank and claims of its various nations. There are several others, more minute, upon which, though of little consequence in themselves, I shall shortly touch, for the sake of taking in every part of the subject.

By these it seems to have been settled, that *Federalities* should yield to States that were Paramount, (m) and that Sovereigns of inferiour dignity, (as

(k) Dr. des Gens. 2, 3. 38.

(l) Thurloe's State Pap. 3. 315. 4. 740. Vattel, 2, 3. 39.

(m) Mackenz. p. 11.



Dukes) should yield to superiour Sovereigns, who were Kings; both of which seem to be in conformity with common sense: that a power though inferior, (as a Duke or Elector) when present in proper person, should take rank of a power which was superior, but present only by his representative or Ambassador; a point formerly much contested, and which so late as the beginning of the present century, was supposed to deserve the particular investigation of Van Bynkershoek, who decided in its favour: (*n*) That the Electors of the Empire, *within its precincts*, are equal to crowned heads, (*o*) and are every where honoured by them with the appellation of brother. Lastly, that the King of France, before the Reformation, took rank of all other European Sovereigns, next to the Emperor.

With respect to this last, it may be supposed that it was a point of so much nicety, as not to pass off without much contest; but, as far as I have been able to observe, it was, upon the whole, allowed, upon the authority of the Papal regulations; and in all ecclesiastical ceremonies, and at general councils, the place of the French Ambassador was almost constantly, till the sixteenth century, allowed to be next in rank to that of the Emperor. (*p*) At that period, however, upon the resignation of the Emperor CHARLES V. a fierce contest, almost immediately ensued for the precedency between France and Spain, which was not decided till the last century, when it seems to have ended in favour of France.

The Spaniards, who till then had never disputed the point, were unwilling to part with the rank which CHARLES, as Emperor, had acquired; and his son, Philip, forgetting that the Sovereign of Spain was no longer on the Imperial Throne, insisted with much

(*n*) Quæst. Jur. Pub. J. 2. C. 9.

(*o*) Mem. touch. les Amb. 519.

(*p*) Wicquef. L. 1. S. 24.

heat upon keeping his pre-eminence. This, however, was vigorously contested by France, at Venice, where the first contest began in 1558. The Spanish Ambassador, Vargas, pleaded, that the rules of precedence must change with the course of events; and that his master, *being the greatest Monarch of Europe*, his rank as such, ought to be adjudged. But Noailles, Bishop of Acqs, the French Ambassador, opposed him with warmth, and the Senate decreed that, without entering upon the examination of the grandeur of the two Kings, they found upon their registers that France had always been preferred in place to Spain, and they therefore felt obliged still to decide in her favour. (q) Four years afterwards, the cause was renewed with augmented zeal and heat, at the council of *Trent*; where the chief business of PHILIP, bigot as he was, seems to have been to accomplish this empty superiority. On the other hand, the French Court gave peremptory instructions to St. Gelais, their Ambassador, not to yield a tittle of the antient prerogative of the Nation; and if the smallest alteration in the ceremonial was attempted to be made, he had positive orders, not only to quit, but to protest against the legality of the Council, and to bring away with him all the French prelates. Philip, remaining firm, would not allow his Ambassador the Count de la Lune to proceed to *Trent*, till his place should be settled, and the Pope in vain proposed that he should be absent altogether from those ceremonies where competition could arise. In the course of the affair, disputes rose so high, that the French declared they would even withdraw themselves from their obedience to the see of Rome, if their place was taken from them; and at length, after many indecencies, which even the sanctity of divine service was not able to repress, it was agreed,

(q) De Callieres. Man. de Negoc. i. 326, 327.

that the French at the Council, should keep their place, but that the Spaniard should change his, and be placed, not third in order from the Legate, (who was at the head of the whole,) but on a seat of eminence, opposite to him. (r)

In this contest, it was difficult to say, who was the first. In another, which arose immediately after at the chapel at Rome, the Spaniard was forced to yield. (s) At the congress at Vervins, 1598, the French again kept their ground; (t) but at London, 1617, King James, whose inclinations were more favourable to Spain, seems to have preferred the latter. The occasion of the dispute was trifling, and would not be mentioned, were it not for the strange pretension which, it is asserted, was on that occasion set up by the French. A mask being prepared on Twelfth Night, the Spanish Ambassador was invited, to the exclusion of the French, who was so impatient of the affront, that he immediately demanded an audience, asserted that his master had a right of priority before any other King, but particularly before that of Spain; nay, even that if the Spanish Ambassador had ever heretofore been present at any such entertainment or solemnity at Court, *it was by the French Ambassador's permission*, when either that he would not be there, or that he was sent to by his Majesty to intreat his absence. This representation being of no effect, he threatened to make protestation of the wrong done to his master, and was actually recalled upon it by his Court. (v) Of such importance, in the minds of our ancestors, was an invitation to a mask! The contest between the nations was continued at Munster, where the Ambassadors

(r) Wicquef. 1. 24. De Callieres ut Sup.

(s) Wicquef. Ib.

(t) Mem. de Belliev. & Sillery. p. 28.

(v) Finet Puntillos of For. Amb. in Eng. 48.



never would see each other, and where a Congress, to put an end to thirty years war, had nearly been broken up, because it could not be settled which of the two Crowns should be named first in the public acts. But the dispute most celebrated, and most serious in its consequences, was at London in 1661; in which, though the Spaniard at first had the advantage, the pride of LEWIS XIV. demanded, and obtained a decisive retribution.

The Count of Soissons, who, previous to this year, had been the Ambassador of France at the English Court, had agreed to wave all contest with Spain, by a compromise, that neither should appear in places where contest would arise. When, however, the Count d'Estrades arrived, he had strict orders to assert the French claim; and, for this purpose, foreseeing that things might come to extremity, had taken over with him a number of Officers belonging to his own and his son's regiments, together with some of the garrison of Gravelines. He also assembled the friends of four Colonels of the Irish Brigade, who happened to be at London; and all these precautions made the Court justly fearful that an affray would arise, which might occasion disorders in the city. (*u*) At this time it was the custom, upon the public entry of an Ambassador at any Court, for all other Ambassadors at the same Court to meet him in procession; a kind of solemnity in which it was necessary that Place and Order should be preserved. Upon the entry, therefore, of the Venetian Ambassadors, the King desired the two rivals not to appear at the ceremony, which saved the contest for that time. But each party being resolute, it could not long be prevented. The Spaniard offered EQUALITY, observing, in the pomp of the Spanish language, that the two nations ought to divide equally the EARTH, the WATER, and the SUN! (*w*) but

(*u*) Negoc. D'Estrades 18. Juill. 1661.



the orders of D'Estrades being peremptory, he refused it, and insisted on maintaining his place when opportunity should offer. The Swedish Ambassador afterwards making his entry at the Tower, the Court, on this occasion, resolved to stand neuter, and allowed the Ambassadors to attend the procession in the usual manner, though they surrounded Tower-Hill with guards, to keep the English from taking any part, in case the dispute should prove serious. The Spanish Ambassador came attended by a train of near fifty persons armed; the Frenchman with one hundred and fifty; whereof forty were horse, well appointed, with pistols and carbines. The French coach attempting to pass next to the King's, the Spaniards, by shouts, frightened the horses, and took their place. The French in revenge, "poured in a volley of shot upon them," and immediately began the action; during which a Spaniard, provided with an instrument for the purpose, ham-stringed the French coach-horses, and the rest making head, the Spanish coach obtained, and kept the place in contest. In this action eight persons were killed, and forty wounded (x) and Lewis XIV. was not unjustly offended at so great an injury to his honour. The event, however, was ultimately in his favour; for being now resolved to settle the point for ever, he threatened war, which the Spaniards not being in a condition to maintain, they made satisfaction for the affront, by recalling Vatteville, their Ambassador, and making a declaration at Paris, before the whole Court, and all the Foreign Ministers, "that their Ambassador should never after be present at any ceremony where a contest for precedence could arise between them and the French." (y) This Convention satisfied Lewis, who asserted it

(w) Id. Ib.

(x) Vide "The Manner of the Encounter between the French and Spanish Ambassadors." &c. drawn up for the English Court, by Mr. Evelyn. Bleg. Brit. Art. Evelyn.

(y) Id. Ib. & Wicquef. 1. 24.

in all places afterwards, except at Vienna, where the relationship between the branches of the Austrian Family gave the preference to Spain. It continued even after it seemed allowed in Europe, that all Crowned Heads were equal; for when Sir William Temple, the mediator at *Nimeguen*, proposed some rules for the observation of the several Ambassadors, indicative of *equality*, the French expressed their acquiescence towards all, except the Spaniards, their rights against whom having been settled by Convention, they could not yield, without the express orders of their Master. (z)

This *equality* of the Crowned Heads of Europe seems, according to the last-mentioned author, to have been first broached near the middle of the last century, when the great GUSTAVUS asserted to the Duc de Grammont, Ambassador of France at his Court, that he knew no other distinction among Crowned Heads than what was made by their virtue. An admirable sentiment! and which we may fairly allow to have arisen from the conscious worth of him who conceived it. The pretence, says *Temple*, was not much disputed with him, in respect to the greatness of his qualities, as well as of his attempts and success; and his example was followed by all other Kings. From that time, therefore, although the French continued to claim precedence next to the Emperor above all other Sovereigns, yet it was allowed by none, except by the Spaniards (a) It is to be observed also, that although, as we formerly mentioned, the Grand Signor has been allowed an equal place with the Emperor; yet the apparent natural consequence of it, namely, his superiority over other European States, has not followed; since they assert.

(z) *Temple's Mem.* 1671, 1679.

(a) *Id. ib.* Some countries, however, yield precedence to others by express treaty. Vide *Martens. Precis du Dr. des Gens.* t. 162.

and are allowed, *equality* with the Porte, notwithstanding the Sultan's equality with one who takes the lead of *them*. (b) This seeming inconsistency may be accounted for, partly by the equal titles of Emperors, which the French and the English have assumed at Constantinople; partly from the circumstance, that the equality of the Turk with the Emperor, was obtained by special treaty with him, the rights of other Powers undergoing no alteration.

With respect to the place of other Kings before this time, an attempt to settle it would be as difficult, as the result would be unimportant. I shall not, therefore, pretend to examine a matter, which, as far as I have been able to observe, was never fairly decided; nations for the most part obtaining precedence among one another, as alliances, interest, favour, or relationship between their Sovereigns directed. Upon the subject of equality, however, it is to be remarked, that it has never been clearly and solemnly *decided* that all Crowned Heads are equal, but has crept by stealth, as it were, into the ceremonial; and the contest, for the most part, is rather *waved* than fairly settled. Thus in drawing up *Treaties*, the contest concerning the right of being first named, (a matter which formerly gave rise to much dispute,) is now got rid of rather than settled, by each party making a copy of the Treaty, in which he preserves all his pretensions, and the two copies are then exchanged. (c)

Thus have we endeavoured to conduct the reader through a part of the Law before us, which, however trifling it may appear, is as difficult to arrange, and productive often of as much serious disquisition as any of the points we have before discussed. From

(b) Martens, I. 160.

(c) De Callieres. Man. de Negoc. I. 232. Martens. I. 164, 169, 170.

not having been well understood, it was formerly, as we have seen, pregnant with a vast number of claims, which powerfully operated upon the situation of Europe. It was sometimes the occasion of war, and always of discussion; and, therefore, however justly it may be despised by superior minds, which can soar above the common prejudices of humanity, it has the fairest claim to a place in this work. At the same time, I have purposely omitted a great part of that vast body of cases of nicety and dispute, which some authors have been studious to preserve. As facts, which let us into a knowledge of our nature, it may not be improper to read them; but as few of them were determined upon public principles, or known maxims, but leave the points in dispute, considered as public questions, fluctuating in uncertainty; I have, for the most part rejected by design, all those in which nothing seems to have been determined, or determined, only *pro hac vice*.



## CH A P. XVII.

THE HISTORY OF THE LAW CONTINUED FROM THE  
FIFTEENTH, TO THE SEVENTEENTH CENTURY.

WE now resume the thread of the history which we proposed to examine, and which the discussion of the influence of particular circumstances upon the Law before us, had caused us in some measure to suspend. We mean now, therefore, to pursue our enquiries from the fifteenth century, (where it will be recollected we were left by the ninth chapter,) until we come to the birth of those voluminous masses of learning which have appeared under the title of the *Jura Gentium*, and to which, as far as they relate to the European Law of Nations, it would be almost in vain to attempt an addition.

The sixteenth century presents us with an extensive and important change, not only in the affairs, but in the public opinions of Europe. That regular appearance which it bore, of one vast assemblage of States, united together under a common spiritual head, allied by the ties of a common Religion, and governed, almost entirely, by one particular set of maxims, will be found, comparatively, to have faded away. And although, with respect to the rest of the world, it still continued to be insulated, as it were, in the observance of certain particular laws, yet the great breach in RELIGION, caused by the *Reformation*, brought along with it a kind of subdivision of its States, which may be said in some measure to have caused an alteration in its Law of Nations. In a former chapter we observed the great influence upon that Law, which was effected by the ECCLESIASTI-

CAL ESTABLISHMENTS, and the doctrines of CHRISTIANITY, as interpreted by particular men. The sixteenth century, however, brought to light, and almost to maturity, tenets of a very different nature. The effects of the positions of LUTHER, were by no means confined to mere articles of faith. As they had theological liberty immediately for their object, so they were intimately allied with political freedom; and in the Law of Nations, all that deference which had been paid, and all those privileges which had been allowed to the Pope, as the head and father of the Christian Republic, were completely annihilated among nations adhering to the *Protestant Faith*. This, as might be expected, was not willingly submitted to, either by the Court of Rome, or its numerous favourers; the two causes became public; nations were ranged under different standards, and mutual and steady opposition became almost a fundamental article of their public law. It must be obvious, that this would beget the greatest innovations in the maxims which had hitherto governed them; and, accordingly, the positions of the *European Law of Nations* came to be ramified into those of the *Roman Catholic*, and those of the *Protestant States*. Each party affected to make the Evangelical Doctrines the rule of their national conduct; but scarcely so great a difference had existed formerly between *Infidels* and *Christians*, as was now to be found between the Christians themselves. The rage which had been common against the *Turks*, was transferred by the *Catholics* to the *Reformed*; and Excommunications, and Crusades, were the mildest means adopted by them to bring them to reason. The latter, finding themselves thus oppressed, and almost hunted to death by those whom they had considered as brothers, had no resource but in an union among themselves; and causes for war, conduct in its pursuit, behaviour in negotiation, and the construction of

Treaties and Alliances, came thus, evidently, to be both modified and enlarged. Two interests, it is well known, were set up in Europe, which in all the circumstances which could influence the conduct of nations, in their public maxims, and even in their formal acts, divided its communities under the names of *Catholic* and *Protestant*. These terms exist, in all their cogency, to this day; and, as the defence of CHRISTIANITY in general, had been formerly the ground-work of the science of politics, and the fairest *legal* causes for many remarkable points of conduct both in peace and war; so the extirpation of heresy among the *Reformed* by the *Catholics*, and, on the other hand, resistance to the *Catholics* by the *Reformed*, had now become points of equal legitimacy among their respective classes of nations.

Hence in almost all the combinations of force which we find going forwards during the sixteenth century, (although Catholic and Protestant Nations were certainly often ranged together, according as more urgent necessity required,) (*d*) yet for the most part the defence of each religion was assigned as an efficient cause for very strict and extensive alliances. Thus, when Queen ELIZABETH had changed the religion of *England*, and her council had determined that excommunications, formerly so much dreaded, were but as “a senseless lightening,” (*e*) she found herself courted by all the Protestants of the world, and came, not unjustly, to be considered as the head and protectress of that interest. When, therefore, she assisted the Prince of *Condé*'s party in France against the *Guises*, she observed, that not to do so, would be “to betray carelessly her own religion, security, and safety.” She spoke of it *as the common cause*; she entertained the strictest correspondence with the numerous followers of her faith in Germa-

(*d*) Vide Mem. de Sully. 2, 81, 245.

(*e*) Camden. 16.



ny; and when she protected the Dutch against Philip, she resolved "that it was Christian Piety to relieve  
 " the afflicted Netherlanders, *Embracers of the same*  
 " *Religion which she professed.*" (f)

Another, and more palpable effect of this division of Christianity, appears in the reasoning of the same ELIZABETH against the remonstrances of Spain, upon the depredations of *Drake* in the South Seas. Mendoza, the Spanish Ambassador, having complained of his sailing at all in the Indian ocean, she answered, that whatever appeared to have been taken by robbery, should be restored; but that as for commerce in those seas, the Spaniards had prohibited it "con-  
 " *trary to the Law of Nations:*" That she could not persuade herself that they possessed any just title by the *Bishop of Rome's donation*, in whom she acknowledged no prerogative in such cases, so as to lay any tie upon Princes *who owed him no obedience*, or, as it were, to infeoffe the Spaniard in that new world. (g)  
 The protection of *Drake*, in consequence of this reasoning, is well known.

On the other hand, the Papists wrought upon one another by the same sort of arguments; the glory of God was to be upheld by the destruction of heretics, and the bloody maxims of intolerancy were every where enforced.

(f) Id. 61, 64, 119, 137, 321. See also a letter of Elizabeth, written in a very vehement strain, to Henry IV. upon his change of religion. *Morlante*, that King's Ambassador, offering, says Camden, all kindness in his Master's behalf she being much disquieted in mind, snatched up her pen, and wrote as follows:  
 " Alas! what deep sorrow! what vehement grief! what sighs  
 " have I felt at my heart for the things which *Morlante* hath told  
 " me of! Whereas you do religiously and solemnly offer me your  
 " friendship, I know, to my great cost, I have well deserved it:  
 " neither should I repent that, had you not changed your Fa-  
 " ther. Verily from henceforth, I cannot be your Sister by the  
 " Father!" She concludes, " Your Sister, if it be after old man-  
 " ner; as for the new, I have nothing to do with it." ELIZ. REG.  
 Id. 475.

(g) Id. 255.



Of this, many parts of our own history are an ample illustration; and in particular, when the bigotted, or hypocritical PHILIP II, was about to invade England, he was instigated, exclusive of other reasons, by such arguments as these. "That, seeing God had blessed him with such exceeding great blessings and benefits, he in like manner would perform somewhat which might be pleasing and acceptable to God. But nothing could there be more acceptable to God than to propagate and enlarge his church. That the church of God could not be more gloriously or meritoriously propagated, than by the conquest of England, and replanting the Catholic Roman Religion and abolishing herefy there." (*h*) So also, when Parry and others had undertaken at various times to assassinate ELIZABETH, and wavered in their undertaking, they were confirmed in it, the one by *absolution* from the Pope, the other by Babington, who laboured to prove to them, that if ever Equity and Justice could be violated, it was to be done for the promotion of the Catholic religion. (*i*) In the same spirit, the massacre of St. Bartholomew was called a *remedy* by De Gondi, the French Ambassador in England, (*k*) and in the Bull of excommunication against the Queen, she is denominated "pretended Queen of England, and the servant of wickedness." (*l*) Trusting to this Bull and the efforts of so powerful a minister of his commands as PHILIP, the Pope had conceived the design of setting one of his nephews on the throne of Ireland, and exercised before hand the rights of Sovereignty by creating *Stukely*, the adviser of the

(*h*) Camden, 402.

(*i*) Camden, 307, 339.

(*k*) Id. 192. It is somewhat curious to remark the long life of Bigotry. If what the author has been himself told at Toulouse be true; processions of thanksgiving were made till within a very few years in that city, in gratitude for this *remedy* of St. Bartholomew's day.

(*l*) Camden, 145.

plan, *Earl of Wexford and Caterlough, Viscount Mourough, and Baron of Ross.* (m)

But however divided the Christian States may appear to have been among one another, they had not lost sight of those marked distinctions which Religion had placed between them, and the Infidel followers of MAHOMET. The Crusades, indeed, had been laid aside from impotency, but the Turks were still considered as the common enemy; and hence when the news of the issue of the battle of *Pavia* was communicated to CHARLES V. he affected rather to lament the wound which had been given to Christendom, by the misfortune of one of its bravest Monarchs, than to rejoice at his own success; he forbade all public festivities, and pretended to wish for an union with his enemies, in order that they might act with greater energy against the common foes of Christianity (n)

On the other hand, notwithstanding the Treaties which, about this time, as we have seen, began to be made with the *Ottomans*; those fierce barbarians continued to enforce their savage maxims against Europe; and such was their contempt, that when the French Ambassador at the Porte communicated to the grand Vizir that his Master had beaten the Spaniards; "of what importance is it to me," replied the Minister, "whether the Dog worry the Hog, or the Hog the Dog." (o) Their proceedings towards public Ministers at their Court, were governed for a long time by this spirit; a writer of the last century asserting, what is proved in a great variety of cases, that the reason why Ambassadors from Christians were allowed to reside among them was, in order to have in their possession *Hostages* for the performance of Treaties, and on whom they

(m) Camden. 230.

(n) Robertf. Char. V. 2. 299.

(o) Rycault.

might revenge their infraction. (*p*) They were the more inclined to consider them in this light, according to the last mentioned author, from the idea which they entertained that Ambassadors were always possessed of some *secret* instructions, which it behoved them to know before they would transact business with them; but which they never could arrive at, as long as they gave into the general maxims of Europe concerning their inviolability. (*q*) They seem therefore for a long time to have considered Christian Ambassadors, as liable to every the most capricious exertion of their power, and their treatment of these privileged Ministers, (*r*) forms a gross and cruel exception to the laws concerning them, which as we shall have occasion to observe, were received and acted upon by all Europe. That it arose chiefly from the spirit which animated the two Religions against one another, may also be fairly supposed, because the *Alcoran* enjoins the good treatment of the *Elchi*, or public Ministers; and in their intercourse with the powers of their own *class*, the Turks proceeded differently with respect to those characters. (*s*)

Within this period, among the States of Europe, began that remarkable and characteristic custom, of entertaining *Ordinary* or *Resident* Embassies at one another's Courts: an institution peculiar to themselves, and particularly evincive of those many dif-

(*p*) Wicquef. De l'Ambass. i. 486.

(*q*) Mem. touch. les Ambass. 117. This idea of the Turks was founded upon some intelligence which they once received of the *Secret Instructions* of *Badovere*, Ambassador from Venice, 1536. The Republic had sent him to treat of peace, the price of which, in his *public* instructions, was to be money. He was however *secretly* instructed to offer three cities in the *Morea* in case money was refused. The Porte, having information of this, insisted upon seeing the *Secret Instructions*, and forced *Badovere* to make peace according to them. Id. Ib.

(*r*) Vide Wicquef. De l'Amb. i. 395. Mem. touch. les Ambass. 115, 116, 120.

(*s*) Wicquef. ut sup.

tinctions



inctions which there are between their Law of Nations, and that of other sets of people.

The right of sending Embassies on *extraordinary* occasions, is as old as Society itself. There are scarce any customs which begin sooner to appear, nor is there a tribe of savages so low in the scale of Humanity, as not to feel the necessity of adopting them. It may therefore almost be said to amount to a *natural* right; (1) certainly, at least, the intercourse of mankind would be for ever retarded, if the attempts of nations to communicate with one another, were attended even with the apprehension of insecurity. Hence the universal opinion concerning the sacredness and inviolability of the character of an *Ambassador*, within the territories of those to whom he is addressed. Hence also, the impossibility of refusing fairly to *hear*, at least, any thing by way of *proposal*, which one State may have to communicate to another. All this, however, does not amount to that right or custom, now so universal in Europe, of entertaining public Ministers for a regular continuance of time at the Court, and in the Cabinets, as it were, of each other; a circumstance remarkable in itself, and unknown to almost all other nations.

It is to the great and peculiar intimacy of the European States, arising from a vast variety of causes, a great part of which we have been endeavouring to detail, that this particular custom must be chiefly attributed. The nations of *antiquity* knew nothing of it: It is equally unknown to the uncivilized, and to most other nations, out of Europe, in modern times. The ties of one common Religion; the assemblage of Princes in one grand Council, to protect a common interest; the custom by which property and dominion could pass from one people to another by marriage; the common laws of a great feudal system;

(1) See Vattel, 2. 5. 65.



the general cultivation of Commerce, for the most part the growth of *Treaties*; the numberless factitious rights, created by positive Convention; and above all perhaps, the wonderful and jealous attention which has for a long time been paid among us, to that part of our policy (generally considered as legitimate) which is known by the term of the *Balance of Power*; all these, as we have seen, conspired to render the connections of the *European* States peculiarly close and binding.

Few, or none of these reasons could apply to the *antients*; and the ignorant, or deliberate policy of most of the moderns (other than European) make it equally inapplicable to *them*. From the slight view which we took of the Law of Nations of other classes of people, it was found that there was little friendly communication among them; certainly, little opportunity of cultivating or extending among *individuals*, those numerous liens which must naturally be continually arising from the circumstances above mentioned. The two of those circumstances most likely to have existed elsewhere, namely, Commerce, and the System of the Balance of Power, were but little known to the politics of the Romans, or their neighbours. Those Giants of their time, despised both the one and the other; and, what is remarkable, their opponents, whether in Asia, Africa, or Greece, do not appear to have paid that attention to them which they deserved. The progress of any one power was not foreseen so long before hand, as to render it necessary for them to settle that combination of alliances and interests, which so peculiarly distinguished the nations of *Europe*, and which render it scarcely possible for one to move, without sooner or later involving all the rest. With respect to Commerce; though much cultivated for the sake of enjoying the produce of the arts, it was but seldom considered as a national fund, or the vehicle of power.

er. The Romans notoriously held it in contempt ; during the Commonwealth they were not known to make one law in its favour ; (u) and they actually inhibited, afterwards, a communication with foreign merchants, lest they should disclose the secrets of the interior. (w) A policy, in which they have been long and strictly imitated by the *Chinese*. (x)

Among such a people, there could be little necessity for a standing regular communication ; their intercourse was temporary, and their embassies confined to *extraordinary* occasions. In Europe, on the contrary, not only *sovereigns*, but even *individuals*, have long had so much, and such intimate connection, that a constant communication of necessity prevails. Almost all the crowned heads are allied in blood, and the politics of various Courts are so interwoven together, that it is become necessary to have agents perpetually on the spot. (y) Commerce, in particular, has been so eagerly cultivated, that the subjects of one country are spread over the face of another, and every community receives within its pale the citizens of all other communities, with friendship and respect. As these, however, would be in a situation peculiarly unprotected if left to themselves, and occasions might perpetually arise in which it would be necessary to appeal to the weight and dignity of their own states ; there was a farther reason for establishing regular and standing embassies, as the channels of intelligence, and the representatives of power. Hence the rise of Ambassadors in *ordinary*.

(u) Taylor's Civ. Law, 496. (w) Codex, L. 4. Tit. 63. L. 4.

(x) It is to be hoped, however, that even our own age may remove the foundation of this remark, and that Peking may soon see a *resident English* Ambassador.

(y) Mere curiosity to know what is going forward, without any personal business to transact, is said to be a reason which inclines the Venetians to receive these Embassies. Amelot. de la Houë, I, 131.

It must be obvious, however, to the historical reader, that the growth of these reasons was slow. Many of them have been traced in the preceding chapters; the balance of power was scarcely thought of, till the contests for Italy arose between France and Spain in the fifteenth century; and the improvements in navigation and discoveries in the *East* and *West*, gave its peculiar spring to *commerce* about the same period. The custom, therefore, we speak of, could hardly have been known before, and it is mentioned accordingly by *Wicquefort*, as commencing not above two hundred years before the seventeenth century. (2)

Ambassadors in *Ordinary* have been attributed by some to FERDINAND the CATHOLIC, whose policy led him to entertain them at various courts, as a kind of honourable spies: (a) by others, with no small probability, to an imitation of the Pope, who had long been in the habit of sending *Nuncios* to reside at various courts in the service of religion. (b) But, whatever was their origin, the Jurists seem to agree that they are not of natural right; (c) and, however universal they may since have grown, doubts, about the period before us, were apparently entertained of their utility. HENRY IV. of France, while King of *Navarre*, entertained none at other Courts; and Henry VII. “that wise and politique King, says Lord Coke, “would not in all his time suffer Lieger, Ambassador of any foreign King, or Prince within “his realm, nor he with them; but upon occasion

(2) *Wicquef. De l'Amb.* 1. 8, 367, 380.

(a) *Fred. Marflaar. De Leg.* 2. 11.

(b) *Barbeyrac. Præf. ad Bynk. De For. Leg.*

(c) *Grot. D. J. B. et P.* 2. 18. 3. 2. *Optimo autem jure rejici possunt, que nunc in usu sunt Legationes assiduæ quibusquam non sit opus docet mos antiquus, cui illæ ignoratæ.*—See also *Wicquef.* 1. 8. 367. 380. *Vattel.* 5. 66.



“used Ambassadors.” (*d*) So late as 1660, a Member of the Polish Diet asserted, that the Ambassador of France had no cause of residence there, and that as he did not return home, *according to the custom of Ambassadors*, he ought to be considered as a *spy*. Two years afterwards, the Deputies proposed very warmly to send home all Ambassadors whatsoever, and to make a law regulating the time of their stay; (*e*) and even the Dutch, who, one would imagine, had greater reason than the Polish nobles for encouraging an intercourse with foreigners, debated in 1651, how far this sort of embassy was of any advantage to them. (*f*) The greater part of nations, however, have now admitted their necessity; and though at the commencement of the period before us, men had affixed no precise ideas to what was considered as a novelty, and even now the admission of these embassies cannot be demanded as a matter of law; yet the custom is so general, and they are considered as so much of course, that the friendship of States can hardly be maintained without them. Not to send them therefore has been sometimes regarded as an affront. (*g*)

The power, however, of remaining for so long a time together at one Court, gave occasion to innumerable opportunities of acting to its prejudice. An Ambassador was thus enabled to become acquainted with the characters of the men in power, and of the nation at large; he could observe their resources, their objects, their factions; he had time to intro-

(*d*) 4th Instit. 155. They were called *Lieger*, from *Legger*, or *Ledger*, (*Dutch*) To remain in a place.

(*e*) Wicquief. 1. 8.

(*f*) Bynkersh. De. For. Leg. C. 1.

(*g*) *Hodie tamen ita usurpantur, ut sine illis, amicitia vix stabilis inter populos diversos coli videatur, etsi nec minus usum habeant exploratorum.* Hub. De Ju. Civ. L. 3. c. 12. See also Mem. touch. les Ambass. 25. where Charles I. of England expresses his resentment against the Dutch for not sending a resident Embassy to his Court.



duce himself into all their designs; to tamper with their honesty, and thereby, if his master's interest required it, to shake the very government itself. Many foreign Ambassadors have been known to do so, more particularly at this period of the augmented business and interests of Europe; means were naturally sought for to resist them; and about the middle of the sixteenth century, a great and solemn question was debated concerning the inviolability of Ambassadors in general, the account of which will form the next object of our speculations.

In the year 1567, *Leslie* Bishop of *Ross*, came to the Court of England, in behalf of his mistress the unfortunate Queen of Scots; who, although she was detained prisoner by the English, was allowed to send him, to plead before the Commissioners appointed to examine into her cause. Nothing was determined by the commission; (*h*) but *Leslie* continued at Court, and exercised the office of Ambassador of *MARY* for the space of one year, when, being concerned in raising a rebellion against the English Government, he was committed to the custody of the Bishop of *London*. From this he was soon liberated, and returning to his function of Ambassador, continued to preserve it near two years longer. At that time, being detected in the attempt to raise a serious conspiracy in favour of *MARY* against *ELIZABETH*, he was once more committed; and the following questions concerning him, as appears from Lord Burleigh's State Papers, were propounded to David Lewis, Valentine Dale, William Drury, William Aubrey, and Henry Jones, learned civil lawyers.

I. "Whither an Ambassador procuring an insurrection or rebellion in the Prince's cowntrey, towarde whome he is Ambassador, is to enjoye the priviledge of an Ambassador?"

(*h*) Camden 113.

II. "Whither he may not; *Jure Gentium* et Civili Romanorum, be punished as an enemy, traitor, or conspirator, against that Prince, notwithstanding he be an Embassador?"

To these two questions they answered: "Touching these two questions, we are of opynnyon, that an Embassador procuringe an insurrection, or rebellion, in the Prince's cowntrey towards whome he is Embassador, ought not, *Jure Gentium*, et Civili Romanorum, to enjoye the privileges, otherwise dew to an Embassador; but that he maye, notwithstandinge, be punished for the same."

III. "Whither, if the Prince be deposed by the comen Auðthoritie of the Realme, and an other elected and invested of that Crowne; the Sollicitor, or Doer of his causes, and for his ayde, (although the other Prynce do suffer such one to be in his Realme) is to be accompted an Embassador, or to enjoye the privilege of an Embassador?"

To this they answered "We doe thinke, that the Sollicitor of a Prince *lawfully* deposed, and an other beinge invested in his place, cannot have the privilege of an Embassador, for that none but Prynces, and such other as have Soveraynty, may have Embassadors."

IV. "Whither a Prynce, comynge into an other Realme, and remayning there under custodye and garde, ought, or may have there his Sollicitor of his causes, & yf he have, whither he is to be cownted an Embassador?"

To this they answered, "We doe thinke that a Prynce comynge into an other Prynce's Realm, and beinge there under garde, and custodye, and remayninge still a Prynce, may have a Sollicitor there; but whither he be to be accompted an Embassador, that dependeth on the nature of his comyssion.

V. "Whi-

V. "Whither if such a Sollicitor be so appointed by a Prynce so flyenge, or comynge into an other Prynce's Realm; if the Prynce in whose Realm, the Prynce so in Garde, and his Sollicitor is, shall denownce, or cause to be denowned, to such a Sollicitor, or to such a Prynce under custodie, that his said Sollicitor shall hereafter be taken for no Embassador; whither then such Sollicitor or Agent can justly clayme the priviledge of Embassador?"

To this they answered, "We doe thincke that the Prynce to whom any person is sent in message of Embassador, may for causes forbidd him to enter into his lands, or, when he hath receyved him, comaunde him to departe; yet so long as he doth remayne in the Realme, *and not excede the bounds of an Embassador*, he may clayme his privilege as Embassador, or Sollicitor, according to the qualitie of his comission."

VI. "Whither, if an Embassador be confederacy, or be ayder, or comforter of any traytor, knowinge his treason towarde that Prynce, towarde whome, and in whose Realme he pretendeth to be Embassador; ys not punishable by the Prynce in whose Realme and ageinst whom such treason is committed, or confederacy for treason conspired?"

And to this they answered, "We doe thincke that an Embassador aydinge and comfortinge any traytor in his treason towarde the Prynce with whom he pretendeth to be Embassador in his Realme, knowinge the same treason is punishable by the same Prynce ageinst whome suche treason is comytted." (*hh*)

These answers of the Civilians were supposed to be so decisive in favour of the intentions of the Court, that the Bishop was sent for from his confinement in the Isle of Ely, and after being sharply rebuked, was

told he should no longer be considered as an Ambassador, but severely punished as one who well deserved it. He, however, answered with much firmness and apparent knowledge of the law of nations, that he was the Ambassador of an absolute Queen, and of one who was unjustly deposed, and had, according to his duty, carefully endeavoured to effectuate the delivery of his Princess, and the safety of both kingdoms. That he came into *England*, with the full authority of an Ambassador, upon public *warrant*, or safe conduct, which he had produced; and that the sacred privileges of Ambassadors were by no means to be violated. *Burleigh* in return, observed that no privilege or public warrant could protect Ambassadors that offend against the public Majesty of a Prince, but they are liable to *penal actions* for the same; otherwise lewd Ambassadors might attempt the life of princes without any punishment. The Bishop persisted in his positions, and maintained that the privileges of Ambassadors had never been violated *via juris sed via, facti*, not by regular form of trial, but by violence. (*j*) This boldness, or the true view which he seems to have taken of this nice subject, appears so far to have weighed with the Ministers of *ELIZABETH*, that they did not dare to put him to death, with the *Duke of Norfolk* and other conspirators, but after detaining him for some time in prison, banished him the country in 1573.

This curious case was ever afterwards the ground work of much disquisition in the law of nations. The opinions of the five *Civilians* above recited, did not long continue to be orthodox; and however some sages of the law of *England* may have formerly determined for that particular country, the best professors of the Law of *Nations* have held, that whatever

(*j*) Camden 169.



crime an Ambaffador may commit, whether againſt the poſitive municipal law of the land where they reſide, or againſt the general law of *nature*, though it may be right to treat them as an *enemy*; that is, as if they were in open hoſtility, yet neither ought more violence to be ſhewn than the neceſſity of ſelf-defence exactly requires, nor can they ever be made ſubject to any ſort of judicial proceſs whatever.

As this may appear extraordinary to the bulk of thoſe who have not taken a view of the opinions on the matter, and to many who have even turned their minds to theſe points; it will be neceſſary, perhaps, to take it up as high as we are able, and to go through the whole ſubject of inviolability in general. We may then examine the authorities on this particular queſtion, by which it will appear how far this opinion is made to extend, the doubts that were formerly entertained upon it, the caſes that have actually happened, and the amount of what has actually been determined by thoſe caſes.

With reſpect to the general point of inviolability, it may be neceſſary to premiſe that it admits of two diviſions, I. as it merely concerns the ſuperiour protection and privileges which Ambaffadors have been allowed to enjoy. II. as it carries along with it, an exemption from the civil and criminal juriſdiction of the country where they reſide, all which we have ſeen, was poſitively aſſerted by the Biſhop of Roſs.

As to the firſt point, there has been at all times thrown about the perſon of an Ambaffador, a certain ſacredneſs which ſeems to have been generally allowed by every nation capable of ſending or receiving one; and it is to be deduced as a natural conſequence of that neceſſity which induces men to receive embaffies at all. For it is one of the firſt laws of mankind that they ſhould ſeek an intercouſe with one another; their love of ſociety and their mutual wants demand and inſiſt upon it. But if they have a right to the  
end.

end, they have also a right to the means, and every necessary immunity to those persons who are chosen as the instruments of communication, must be a natural consequence of the consent to encourage that communication. But this immunity will, for the most part, amount to protection far greater than that enjoyed by the common subjects of the state. An Ambassador neither knows, nor submits to the laws of the country to which he is sent; he goes not on his own account, on private business, or private pleasure; but as the representative of another; as the presentation of the dignity, privileges, power, and rights which others *would enjoy*, had they continued within their own precincts. And thus, by consent, and a sense of mutual advantage, he is allowed to represent and personify, if I may so call it, all these high privileges in the very bosom of another community, for the sake of transacting better the whole business of the world. But this, as is obvious, could never be, if such a representative were to be considered, as no other than a common subject of the land to which he is sent; as one, merely enjoying the protection of such laws as prevail, which in many cases may be no protection at all. Hence, the peculiar sacredness which the laws of the world have thrown about the persons of Ambassadors; and the indulgencies above all other men, within the same community, which, from the most antient times, they have been suffered to enjoy.

Of this we have examples in the oldest histories, and in almost all codes of law; and among the rest, an eminent one in the Jewish story, where *David's* messengers to *Hanan* King of the *Ammonites*, being treated with contempt and insulted by that prince, whom they were sent to console on the loss of his father, it was the cause of dreadful war between the nations, in which seven and forty thousand of the  
Ammonites

Ammonites were destroyed. (k) So also the great rage expressed by *Xerxes* against *Athens*, which ended in the entire destruction of that city in the Persian invasion, was said to be owing to their violence towards his Ambassadors though coming with an hostile message. The sack of *Rome* by *Brennus*; of *Corinth* by the *Romans*, and of *Philomela* by *FREDERICK BARBAROSSA* in the thirteenth century, was the consequence of the same sort of conduct. Hence, also, those various marked passages in the *Digest*, and the works of different Roman lawyers, which all tend, in the most explicit terms, to enforce this necessary doctrine. The *Arabians*, the *Chinese*, the *Indians*, and the *Mexicans*, are all found to unite in it, (l) nor is there scarce a point in morality more generally received; the exceptions to it being few in number, and chiefly to be found among the *Turks*, upon the reason for which we have already observed.

The cases are indeed innumerable, in which the security of public Ministers is peculiarly provided for above other men, and the rule seems to be, that every privilege should be bestowed upon them, *the want of which would interfere with the purposes of the Embassy.* (m) Thus, it seems universally agreed, that a public Minister and his *Suite*, shall always be exempt from every sort of law process in the nature of a civil action, from the just fear that their being liable to be so called upon, might perpetually engage their attention from matters of higher import to their nation. Nor is this the injustice, which at first it may be imagined, to the subjects of the country where they reside; since, as their privileges in this respect are *known*, it is at their own peril that any one puts a confidence in them. (n)

(k) 1 Chronicles, chap. 19.

(l) See Vattel, 2. 284.

(m) Bynkerth. De For. Leg. c. 6.

(n) Vide Grot. D. J. B. et P. 2. 18. 9. 10.

So universal is this exemption among the *European* States, that where a particular constitution does not allow the Prince a discretionary power in these matters, the laws have generally taken it into their consideration, and brought the country to a level with the universal Law of Nations upon the point. Thus, it being found in *England* in the beginning of this century, that there was no legal punishment for those who violated the privileges of an Ambassador; the 7th of Ann. c. 12. was passed, by which the matter was put out of doubt; and whoever now dares to sue out any process against any public Minister, or his domestics, are deprived of their trial by jury, and if convicted of the same by the oath of one or more witnesses, before the Lord Chancellor, and the two Chief Justices, or any two of them, “they are to be deemed violators of the Law of Nations, and disturbers, of the public repose, and to suffer such pains and penalties and corporal punishment, as the said Lord Chancellor and Chief Justices or any two of them shall judge fit to be imposed and inflicted.” Thus these magistrates, according to Blackstone, have an *unlimited* power to proportion the punishment with the crime. (o)

The occasion of the Statute was the well known arrest of the Russian Ambassador on the 21st July 1708, who being upon the eve of his departure, and indebted to Thomas Morton, a laceman, and various other tradesmen, they resolved to arrest him according to the ordinary forms of law. This was done with some circumstances of aggravation, for the Ambassador, thinking himself attacked by Russians, defended himself, but was overpowered, and ill used by the Bailiffs, who carried him to a spunging-house, where he was detained till the Earl of Feversham bailed him. He immediately complained to the

(o) Commentaries, 4. 71.



Queen of this violation of the Law of Nations, and the Count de Gallas and the Baron Spanheim, Ambassadors of Sweden, and Prussia, together with several other foreign Ministers, joined in the complaint. The Queen was indignant at the affront, and Morton, the attorney, and all who were concerned in the arrest, to the number of seventeen, were committed to custody, and ordered to be prosecuted with the utmost severity of the law. Most of them were brought to trial, on an information of the Attorney General, and were found guilty of the *facts*, though the question, how far those facts were criminal, was reserved to be argued before the Judges; which question was never determined. (*p*) Mr. Boyle, the Secretary of State, writing to the Ambassador, speaks of the attempt as “desperate and dismal,” and the Privy Council were several times summoned to consider of his satisfaction. (*q*) As far as punishment, however, was concerned, none could be obtained, and the affronted Minister was forced to be content with his liberty, the reimbursement of his expences, and the enactment of a law, by which the above-mentioned provisions were made in future. (*r*) The preamble, however, having merely observed, that the *Muscovite* Ambassador had been taken out of his coach by violence, in contempt of the protection granted by her Majesty, *without taking notice of the breach of the Law of Nations*, “which is superiour and antecedent to all municipal laws;” the foreign Ministers in London met again together,

(*p*) Black. Comment. i. 255.

(*q*) Tindal. Contin. of Rap. 4. 103. fol.

(*r*) Mr. Addison, writing on this subject to Lord Manchester at Venice, observes, “Your Lordship knows that the privileges of Ambassadors are under *very little* regulation in England, and I believe that a bill will be promoted in the next parliament for setting them upon a certain foot, &c. &c.” Cole’s State Pap. 54<sup>c</sup>.

and procured the addition of these words, “ Con-  
 “ trary to the Law of Nations and in prejudice of  
 “ the rights and privileges which Ambassadors, and  
 “ other public Ministers, authorised and received  
 “ as such, have at all times been thereby possessed  
 “ of, and which ought to be kept sacred and inviola-  
 “ ble. (s) With this Act of Parliament elegantly  
 engrossed, and an apology for not being able to pu-  
 nish the persons of those who had affronted his Mi-  
 nister, the CZAR, who at first insisted upon their  
 deaths, was at length induced to be content; and  
 thus ended this delicate affair. We may observe  
 upon it, however, that although it was thought ne-  
 cessary to quash the proceedings against the *Muscovite*  
 by this express act, yet nothing was absolutely de-  
 cided upon the old law of the land, as it might be  
 supposed to relate to the validity of a process against  
 an Ambassador. All that was settled with certainty,  
 was the impossibility to punish those persons who  
 made the arrest, and the nullity of such arrests in fu-  
 ture. No precedent had been known by which such  
 detentions had been authorised, or even attempted;  
 and a question therefore may not unfairly be raised,  
 how far the law of England, even before this time,  
 ever permitted what it calls in the Statute, “ a Vio-  
 “ lation of the Law of Nations.” *Comyns*, though  
 he mentions not the punishment of their infraction,  
 yet seems to hold that all process against Ambassa-  
 dors was void, even before the 7th Ann; since in  
 laying down the law of Ambassadors, he quotes the  
 opinion of *Grotius*, concerning their immunity, be-  
 fore he comes to mention the statute. (t) And it is  
 therefore not improbable, that he thought that opi-  
 nion was a part of the common law of England, al-  
 though much elucidated and strengthened by the sta-  
 tute. *Blackstone* asserts in terms, that the *common*

(s) Tindal, 4. 118.

(t) *Comyns Dig. Art. Amb. B.*

law of England recognizes the rights of Ambassadors in their full extent, by immediately stopping all legal process, sued out through the ignorance or rashness of individuals, which may intrench upon the immunities of a foreign Minister, or any of his train; “the more effectually to enforce which,” he continues, “when violated through wantonness or insolence, it is declared by the statute 7th Ann, &c. &c.” Hence it should appear, that in his opinion, the statute did not create any *new* law, except as far as the punishment of the persons violating the Law of Nations was concerned; and that the rest was merely *declaratory* of what the common law had always been. (u) Whichever way this may be, in other times, probably, the violaters of the law would have been severely punished, even without such a statute, as may be collected from the following case. In the year 1627, one *Philip Weiseman* a German, who was a kind of Purveyor to foreigners in England, having bargained to defray the Ambassador of Denmark’s expences at a certain rate from Paris to London, made some unreasonable demand upon him on his arrival at the latter place, and that, says *Finet*, “with much touch to his honour.” The Ambassador complained to the Lord Chamberlain, who acquainting the King, order was made for the Lord President of the Council, the Lord Chamberlain, and the Vice Chamberlain to “*hear and determine*” the business. The cause was examined, and the following record and sentence was the consequence.

“Henry, Earle of *Manchester*, President of the  
 “Privy Councill of his Majesty of Great Britain;  
 “Philip, Earle of *Montgomery*, Great Chamber-  
 “laine, and of the Councill of State to his said Ma-  
 “jesty, being Commissioners and Deputies for his

(u) Comment. 4. 70.

“said



“ said Majesty to heare the protestation which the  
 “ Lord *Rosenbranck*, Ambassador Extraordinary from  
 “ his Majesty of Denmark, shall make against *Philip Weiseman*, for certaine injuries and calumnies  
 “ which he should speak and write against his person, in prejudice of the honour of the King his  
 “ master, and of his own particular reputation;  
 “ having by expresse commandment from his Majesty adjourned, and examined the foresaid *Philip Weiseman*, and having understood at the same time,  
 “ by confrontation, some of the domestiques of the said Lord Ambassador, and others; as also examined his letter to the said Lord Ambassador: we  
 “ finde that the said *Phillip*, without any reason or cause, having received more monies than were  
 “ agreed upon, according to his own confession, hath maliciously and impudently blazed abroad,  
 “ such words and writings, *without having regard to the honour of the person whom he presents*, or to his  
 “ own particular quality; Therefore we have inordered that he be put in safe custody, untill he give  
 “ satisfaction to the foresaid Ambassador, *if he thinks it not fit to bring him before the King his master, to be punished according to his demerit*. In faith whereof  
 “ we signe this present instrument this 14th of April  
 “ 1627. *Manchester—Montgomery—Carleton.*”

“ The fellow,” continues *Finet*, “ persisting stubborn and most averse from submission, was after four or five days restraint in the house of a messenger, delivered by a warrant from the Lord President, and the Lord Chamberlaine, from the Messenger’s hands to the Ambassadors; who, causing him to be imprisoned in the counter, by virtue of the said warrant, *which gave him power to dispose of him*, he was upon the point of being sent to *Hamburg*; but his stomach lessening, and his submission made with acknowledgement of his guilt, both by word, and



writing, he was at last set at liberty. (x) And here we shall close what we have to say concerning the exemption of Ambassadors from the *civil* jurisdiction of the country where they reside.

Concerning their exemption from the criminal jurisdiction, in case they violate either the positive laws of the land, or the general law of nature, much more is to be observed; nor is there perhaps a subject of greater nicety, within the whole scope of the law before us.

Certainly it may at first startle us, to think that a human creature, a foreigner, a bad man, or a fool, shall have it in his power to come into our country, and be guilty of riot and disorder, raise rebellion, or commit murder, and shall afterward set the arm of the law at defiance, merely because he is cloathed with a representative capacity. It can never, it should seem, be intended, by the custom of nations, that inviolability should extend so far; for in that case it would indeed be in the power of lewd Ambassadors, according to Lord Burleigh's expression, (y) to attempt the life of Princes, and to plead privilege from punishment. But neither the one nor the other is the intention of the Law of Nations, as we shall presently see.

The whole reasoning upon this subject may receive much light from the *general* doctrine of inviolability, which may be reduced shortly to this; that although one of the first principles concerning civil society is, that every creature, within the pale of a community, should, for the sake of the common good, be amenable to its laws; yet that for the sake of the same common good, cases may and must arise, which may form an exception to the general rule, and it may therefore sometimes be permitted, that either one man, or an order of men, may be

(x) *Finet. Puntillos of For. Amb. in Eng.* 204. (y) *Ub. Sub.*  
deemed

deemed absolutely exempt from all jurisdiction whatsoever, either for ever, or *durante officio*, according to the different forms of the constitution.

This is eminently proved by the nature of the place of a Sovereign; the inviolability of which is a part of its very being. By the place of a Sovereign, I mean not any particular form of power, or any particular division of it. I mean not a *King*, an *Oligarchy*, or a Democratic Council, or a mixture of all three. I mean, simply, that power in a State, which, according to the shape of its constitution, is, while it lasts, SUPREME. It is evident that such a power must be inviolable, or there would be a contradiction of terms; and not only this, but a possibility, every moment, of destroying, not merely the Government, but the Constitution; for no Constitution can contain a provision for its own destruction.

To be a little more particular on this subject, let us suppose the case of a *Public Functionary*, invested with the *supreme* executive power of a State, without appeal. It is clear that he must be inviolable, whatever breaches of the law he may commit; for if he is not so, he is liable to be tried somewhere, and that power which tries him must itself be supreme above him; but he himself was supposed to be supreme, and the two are totally incompatible. It is very true that there are *Functionaries* who may be, and have been made, amenable to particular tribunals in the State; but such Functionaries are evidently not *Sovereigns* in the pure sense of the word; and any objections therefore, founded upon this can have no force. It is also very true, that the Constitution may be such as to vest the Sovereign power in the same hands, only for a certain time, in which case the Functionary may be tried for misconduct, *after he has laid down his office*; and this is the only remedy which a people can *legitimately* and *formally* have against a tyrannical ruler. But neither

can this apply to those Sovereigns that are *hereditary*; nor does it at all impugn the idea of inviolability *durante officio*: For could either the hereditary, or the temporary Sovereign, be deprived of his power, *durante officio*, and then made answerable; the whole absurdity and incompatibility of the two ideas would revive; the Sovereignty, it is evident, would no longer exist; that power which could have the right to *deprive* the Functionary of his station, (let his crimes be what they would) being plainly above him.

This doctrine will prevade every part of the subject, and every case that can possibly be supposed; nor is there any refinement, nor any invention which can get rid of it. It is a radical defect, if you will, incident to every scheme of Government, but it is a defect which it surpasses the limits of human understanding to cure.

Under our own Constitution we have secured ourselves from any legal pretence in the Sovereign, to rise above the laws; not only by the implied doctrine of a compact between the King and the People, but by an actual compact, entered into and confirmed by a positive oath, to execute the laws. Now let us suppose, what is not the case, that it was allowable for the State to remove him from the throne, in case he broke his oath; still it would be impossible to erect any Judge of the case wherein he had done so, without annihilating the idea of his independent Sovereignty. For the Judge, so constituted, would be more sovereign than the Sovereign, which is absurd; or if, for the sake of getting rid of the contradiction of terms, we say that he would be more sovereign than the Functionary; he would himself be the Sovereign of the land; he would control the controller; he would be the sole Judge of the case *when* the King had broken his oath, and he could abuse that power at pleasure, since no check  
over



over him could be supposed, without beginning again the same chain of difficulty, and ending again exactly where he had begun.

The French, in their constitution of 1791, in which there is so much to praise and to condemn, endeavoured to fix a case of this kind, in which the attempts of an hereditary Sovereign might be legally punished by dethronement. They enacted, "That  
 " if the King should put himself at the head of an  
 " army, against the nation, or would not oppose by  
 " a formal act, any enterprise of the kind, which  
 " was made in his name; or if, being out of the  
 " kingdom, he did not return within a time appointed by the legislative body, which should not be  
 " less than two months; in these three cases, that  
 " he should be deemed to have abdicated the kingdom." (z) They did not, however, attempt to say expressly, with whom it lay, to declare, *according to law*, that the abdication was made. And yet such *legal* declaration would be absolutely necessary, to give legal authority to any proceedings which might be founded upon it; and even if we suppose, what is natural, that they meant the legislative power to make such *legal* declaration; it is evident that the *Legislative* power, was thus the *Executive*, for if it pronounced this abdication upon a *false* pretence, there was no power in the State to call it to account for it.

But are we really then to suppose, that the Sovereign of a state is actually so omnipotent, as to be incapable of being resisted? is he to be allowed to trample upon all the rights of those whom he governs; to set up power as right, and caprice as law? Or, if there are laws which he cannot alter, is he to

(z) Vide. Art. 6 & 7. S. 1. Ch. 2. T. 3. of the Constitution Francoise, 1791.



be permitted to break them at pleasure, and to find security for every sort of crime?

We answer, that as long as the *Constitution* is preserved, we are left without remedy; for no legal remedy is it able to supply. If therefore, goaded by the insults and injuries of a *Monster*, we are driven beyond our patience; our resource is, not in the law, but a *violation* of it; not in the *constitutional* punishment, or *ridance* of the Tyrant, but in the absolute *illegal* destruction of the Constitution itself; for such is every successful rebellion, and every forcible change of the *legitimate* Sovereign. And hence, in case of failure in our resistance, even to a Sovereign who endeavours to set himself above the laws, the consequences must be upon our own heads; for no one can say, not merely that the law has not, but that it *ought* not to have the power to punish us. (a)

The Revolution of *Great-Britain* in the last century, furnishes inexhaustible food for speculation. I will venture one, which I do not remember to have seen. JAMES was equally the violator of his compact with *England* and with *Scotland*; and he was driven away, by the same means from both countries. In the first, however, the *Constitution* was preserved. In the last, it was absolutely broken. In *England*, the throne was declared *vacant*, which was an actual fact; (however rebellious the means which procured it,) and the parliament did nothing more than exercise its *constitutional* functions of *filling up* the vacancy. In *Scotland*, the Parliament did, what, according to us, it never could have the *legal power* of doing, when it declared that King James had *forfeited* his crown. A youthful imagination, inspired with a warm spirit of liberty, is apt to prefer

(a) It was this no doubt that made the veteran Sir John Maynard bid the Revolution Parliament *beware*, since they debated with an halter about their necks.

this boldness of *Scotland*! A more experienced mind, inspired with an equal love of liberty, but tempered by an attention to the nature of laws, observes with pleasure the judgment of *England*!

So much then for the inviolability of Sovereign Powers, in order the better to demonstrate the *possibility* of such a privilege in the abstract. In the future course of our subject, we shall have occasion to observe, how this account of the nature of inviolability *in general*, will apply itself to that part of our enquiries which gave rise to it. For having advanced so far as to discover, that there actually are cases in which an exemption from trial is necessary, and even unavoidable; and having discussed the possibility, or impossibility of *legally* getting rid of this exemption, and, moreover, what we are actually to think of the mode by which we may remove its pressure; we shall have the less difficulty in examining the nature and extent of that sacredness of person, which has been claimed and enjoyed by *Ambassadors*.

This exemption from trial however, in a public Minister, does not go so far as that which we have just been discussing in the case of Sovereigns. For the latter is absolute, general, and entire; the former is confined solely to exemption *from the jurisdiction of those tribunals which distribute justice to the country where he resides*. It is never pretended by the law of his privileges, that an Ambassador shall not be tried *at all*; but merely that he shall not be tried by those who receive him. Accordingly, it is held that he should be stripped of his functions, and sent back to his Master with a request for his punishment; and if his Master refuse, he makes the act his own, and the nations are then in a state of hostility together. Thus if an Ambassador even commit *murder*, or stir up rebellion at the Court where he resides, the Court shall not take farther cognizance thereof, than  
to

to prevent greater mischief; and, sending him from the country, shall leave it to his own to do justice.

This is founded on two reasons: First, because the necessity for Embassies, demands the absolute freedom of the Ambassador, in *every case* that can arise. Secondly, because the Ambassador appears not in his own person, but represents that of another, and is allowed to be held to do so by the compact which receives him as Ambassador. (b)

That his freedom should be absolute, even in the case of the most atrocious delinquency, will appear to any one who considers the nature of his functions, which would otherwise, not only be most dangerous to himself, but perpetually run the hazard of being annihilated. An Ambassador is, for the most part, constituted for the protection of the interests of his nation, in the very bosom of another nation, whose interests may be opposite. He is the mouth-piece of his own Government, and the possessor of its secrets; he is also the representative of his Master, to all the subjects of his own nation who may happen to be in the country, and who may have extensive property to protect, and distant interests to secure. It is hardly possible to conceive a situation of greater burthen and magnitude, or requiring greater real power, and yet so little supported, or rather so entirely destitute of defence, if he was not surrounded by bulwarks far stronger than those which are the defence of common persons. If he trusted only to his own innocence for exemption from trouble, he would trust solely to the sense of justice of those, under whose absolute power he was daily living; and who, besides, would have every temptation that can be urged to the human passions, to violate his security.—For as the power which could punish him if guilty, would

(b) Grot. D. J. B. et P. 2. 13 4, 5. Heberus De J. Civil. Lib. 3. c. 12. 22, 24.



of course have the right to accuse him, *whether guilty or not*, cases might be perpetually happening, or might be continually feigned, in which he might be brought to trial, although he were innocent. And thus, the business of the Embassy might be stopped, the person of the Minister humbled, his papers seized and inspected, and his whole secrets discovered, under pretence of a formal process, which in the end, it might prove, he had never deserved. But being thus, not in the situation of an ordinary person who trusts to his little consequence for an escape from the jealousy of the State, he has a natural right, it should seem, to greater protection. In all schemes of penal law, the ease with which a crime may be committed, and the greater temptations which are held out for such commission, are deemed fair reasons for a greater severity of punishment to prevent it. But as a nation cannot be punished itself, by any judicial process, and the Ambassador is therefore deprived of this support to his security, the world has done wisely, in cutting off all possibility of temptation at all, by exempting him from all jurisdiction whatsoever in the country where he resides, even at the hazard of allowing him *for a short time* to do wrong. Nor is it of consequence to consider whether this wrong be against the municipal and positive laws of the State, (as the crime of coining,) or against the general law of nature and nations, (as murder). (c) I say *for a short time*, because, as it is allowed that a Minister who has really offended the laws, may be sent home by force, and his punishment even demanded, it is not probable that a violent man who had once offended, would ever be allowed to repeat the offence. And thus even in the event of a crime, this is one of

(c) Unde sequitur; quod non modo in iure civitibus, ut aliqui volunt, sed ne quidem in his quæ sunt *juris natura et Gentium* delictis, pænæ sint subjeçti. Huber. De J. Civ. p. 12. 10.



those cases, in which the interest of the world is more benefited by its exemption from punishment, than it is hurt by suffering the law to be broken with impunity. It is suffering an evil, but it is suffering it for the sake of a greater good. (d)

That this is the Law of Nations as founded upon reason, is the opinion of *Grotius*, who seems to have been the first who started it with precision; of *Wicquefort*; (e) of *Zouch*; (f) of *Huber*; (g) of *Bynkershoek*; (h) and of *Vattel*; (i) names which stand highest among the Jurists of the world. It was, however, warmly contested in *Europe*, and for a long time divided the *Civilians*, who, as we shall have occasion to point out in another Chapter, had not yet fallen upon the true method of coming at the Law of Nations. In truth they had not yet shaken off the trammels of the Roman law, and numberless difficulties were therefore started from the *Digest*, concerning the word *Legatus*, the only one known in Latin for Ambassador. For they did not recollect immediately, that it admitted of two interpretations, namely, an Ambassador from one independent State to another; and a *Deputy* from a dependant province to the Court of Rome; and hence the source of much of the contest concerning this opinion. By degrees, however, this error was discovered, the

(d) Adde quod securitas Legatorum, utilitati quæ ex pæna est preponderat. Grot. D. J. B. et P. 2. 18. 4, 5.

(e) De l'Ambassad. passim. *Wicquefort* composed his work expressly to prove the point, smarting under the punishment, which being Minister of Lunenburg at the Hague, he had received from the States, in whose service he also was, and whose secrets he had betrayed.

(f) Solutio Quæst. De Leg. del. Jud. comp.

(g) De Jur. Civ. 3. 12.

(h) De Foro Legatorum. c. 17, 18, 19.

(i) L. 2. S. 94, 5, 6.

practice

practice of nations was appealed to, and the Jurists gradually came to adopt it as sound. (k)

Concerning this practice, as it is to be found in the cases upon the records of Europe, we now proceed to enquire. These, as it may be imagined upon almost any point where so much is left to discretion, and where a common court of judicature is wholly unknown, will naturally vary, or at least be capable of different interpretations. More particularly, as we have seen what were the opinions of the English Civilians in the middle of the sixteenth century, it may be supposed that the earlier cases will militate against the doctrine just recited. It happens however, not only that the proceedings upon the point, have been uniform since the time of *Grotius*, but I have not been able to find any case full enough in its circumstances, to be of sufficient authority, in which an offending Ambassador *has been regularly tried by the laws of the land*. *Bynkershoek*, who made this enquiry with great industry at the beginning of this century, could only discover four instances in which Ambassadors had ever been brought to *punishment* at all; and of these four, three were attended with additional circumstances, which took them out of the case. The fourth stands alone, nor from his manner of relating it, can we arrive at any of the facts; he observing simply, “In Lusitania Legatus “quod adulterium comisisset, ultimo supplicio affectus.” (l) We are therefore left in the dark, whether his death was the consequence of *open violence* or fair trial. Many Ambassadors indeed have been threatened, many chastised, many banished, many have suffered violence; but every thing they have suffered has been more by way of *prevention* and

(k) De Legatis summarum Potestatum varie nostro tempore disceptatum et observatum. Prævaluit tandem sententia Grotii. Hub. Prælect. ap. Bynk. De For. Leg.

(l) De For. Leg. c. 17,

self defence, than regular punishment; and none, that I have found, have been brought to open trial.

In the year 1584, not long after the opinion delivered in the Bishop of Rois's case, *Mendoza*, the Spanish Ambassador in England, having conspired to introduce foreign troops, and dethrone the Queen, (m) it was a matter of difficulty how he should be punished. Had the Council thought the opinions of *Lewis Dale*, and the other Civilians good law, they probably would have acted upon them; for here was a case, precisely similar to that on which they had been consulted. They however took the opinions of the celebrated *Albericus Gentilis*, then in England, and of *Hottoman* in France, who both asserted that an Ambassador, *though a conspirator*, could not be put to death, but should be referred to his principal for punishment; or, (according to *Hottoman*) sent away by force out of the country. (n) In consequence of this *Mendoza* was simply ordered to depart the realm, and a Commissioner sent to *Spain* to prefer a complaint against him. (o)

Three years afterwards there was a conspiracy not only to dethrone the Queen, but to put her to death. The circumstances are these. L'Aubespine, the French Ambassador, being wholly devoted to the Queen of *Scots*, endeavoured to procure the assassination of ELIZABETH. For this purpose he tampered both by himself, and Secretary, with *William Stafford*, a man about the Court. Stafford refused to be concerned in it himself, but recommended *Moody*, a noted ruffian, then in Newgate, to be the instrument. With this man conferences were held by *Trapp* and *Cordalion*, both of them Secretaries to L'Aubespine. It was proposed to take off the Queen by poison, or to blow her up by firing twenty

(m) Camden, 296.

(o) Camden, ubi sup.

(n) Zouch. Solut. Quæst. 130.



pounds weight of gunpowder under her bed. Neither method was approved by *Trappy*, "who wished for such another resolute fellow as had assassinated the Prince of Orange." In this state of the affair, *Stafford* revealed the plot. *Trappy* was arrested, and both he and *Stafford* confessed the whole before the Council. The Ambassador was sent for, but said, "he would not hear any accusation to the prejudice of the privileges of Ambassadors." When *Stafford* was brought in, however, he assented to his knowledge of the matter, but said it was first propounded by him. *Stafford*, on the contrary, protested on his salvation that the first he knew of it was from the Ambassador. Lord *Burleigh* then reproached him with the design; yet never thought of trying him. All that we can find is, that he bad him beware how he committed Treason any more; that the Queen would not by punishing a bad Ambassador, prejudice the good; and that he was not acquitted from the guilt of the offence, though he escaped the punishment. (*p*) In 1601, the Comte de *Rochpot*, being Ambassador from France to Spain, his servants had a quarrel with some Spaniards at *Valladolid*, in which two of the latter were slain, of whom also one was a priest. The Magistrates seized the criminals with a view to try them, but upon *Rochpot's* complaint, and retiring from Spain, they were delivered into the hands of the Pope, at Rome, and finally released. (*q*)—HENRY IV. of France, having given a promise of marriage to Mademoiselle *D'Entragues*, and afterwards marrying Mary de Medecis; the Spanish Ambassador *De Zuniga*, after the birth of the Dauphin, plotted with the father of the lady, and the Comte D'Auvergne, to carry her off to Spain, together with her son by HENRY, whom they meant to

(*p*) Camden ad an. 1587.

(*q*) Winwood's Memorials, 1. 342. Mem. de Sully, 2. 73. Q<sup>uo</sup>.



consider as the real Dauphin. The plot was discovered: D'Entragues and D'Auvergne were tried and imprisoned; but though the crime of the Ambassador was manifest, the King would not suffer him to be punished, (r)—The Spaniards had before this, in time of full peace, plotted with *Merargues*, Syndic of Provence, for the surprise of the city of *Marseilles*. The affair was carried on by *Merargues* and *Bruncscau*, Secretary of the Spanish Embassy, under whose garters a paper containing the particulars of the treason was discovered. *Merargues* was tried and put to death, but the Spanish Ambassador demanded *Bruncscau* as his Secretary, and under the protection of the Law of Nations; and the King, HENRY IV. having consulted the most able Jurists at Paris, delivered him up with an order for him to depart the kingdom. (s)—In 1603 the *Duc de Sully*, then Marquis de *Rosny*, being Ambassador at London, one of his retinue quarrelled at a brothel with some English, one of whom he killed. The populace rose, but were quieted by the Lord Mayor, who demanded justice. Justice however was not done by the Magistrate, but by *Sully* himself; who assembled a council of *Frenchmen*, condemned the man to death, and not till then, delivered him to the civil power. JAMES I. pardoned him, but no attempt was made to try him by the English law, and *Sully* delivered him up solely for execution. (t)—In 1618, *Alphonso de la Cueva*, Marquis de *Bedmar*, Ambassador of Spain, contrived the famous conspiracy against *Venice*. It is needless to go into the particulars of that celebrated plot. Suffice it to say, that the town was to be set on fire,

(r) Wicquef. 1. 392.

(s) Ib.

(t) *Mém. de Sull.* 2. 191, 192. Another, and a very curious question, arose out of this case; the French contending, that, although JAMES might remit the execution of the man in *England*, yet, being a Frenchman, and judged by his own tribunal, he could not grant him a pardon.

the citizens and nobles murdered, and the Government overturned. The facts were proved against *Bedmar*; arms and fireworks were found in his house, and letters concerning their application. But though the populace endeavoured to destroy him, the senate protected him from violence, and contented themselves with sending him to *Milan*, and requesting the King of Spain to recall him. (u)—In the reign of King JAMES I. of England, the Spanish Ambassadors *Inoyosa* and *Colonna*, endeavoured to breed a disturbance in the country, by informing the King that the Duke of *Buckingham* meant to imprison him by means of the Parliament, and to transfer the regal authority to the Prince of *Wales*. Both the Court and the Parliament deemed this a scandalous libel, but knew not how to proceed with the Ambassadors.—Sir Robert *Cotton*, who was consulted, wrote a tract called “A Relation of the Proceedings against Ambassadors who had miscarried themselves,” in which he asserts “that an Ambassador, representing the person of a Sovereign Prince, he is by the Law of Nations exempt from Regale Tryale; that all actions of one so qualified, *are made the act of his Master*, until he disavow them; and that the injuries of one absolute Prince to another, is *Factum Hostilitatis*, not *Treason*, so much doth public conveniency prevail against a particular mischief:” He then states various examples of Ambassadors who have had violence put upon them *by way of prevention*, rather than *punishment*; none of them even amounting even to a design to try them; and then recommends that some of the chief Secretaries should wait upon the Ambassador of Spain, and *by way of advice*, desire him to keep his house, for fear of the people; that the Prince of *Wales* and Duke of *Buckingham* should complain of the calumny in Parliament; that *both Houses* should, in conse-

(u) St. Real. Conjur. des Esp. Contr. Ven.

quence,

quence, wait upon the Ambassador, to request to know the authors of it, in order to *try* them *legally* in Parliament; that if he refused, he should then be confined to his house, and a formal complaint sent against him to the King of Spain, *requiring such justice to be done upon him, as by the Leagues of amity and the Law of Nations is usual*: If the King refused, it would then be “*Transactio Criminis* upon himself, “ and an absolution of all amity, amounting to no “ less than war denounced.” (w) This was the opinion of the English Court, complaint was made to the King of Spain, and the Ambassador allowed to depart, but without the usual presents. (x)—In 1657, a domestic of Monsieur de *Thou*, Ambassador of France at the *Hague*, endeavouring to commit violence upon a woman in the streets, he was detected by the patrol and carried to the guard house, *in order to be delivered to the civil tribunal*. He was, however, demanded by *De Thou*, of the Deputies of Holland, *as a privileged person*, and restored to the municipal power to receive justice from the hands of his Master. (y)—In 1666, a hunting party being made by the Court at Vienna, a gentleman in the suite of the Spanish Ambassador, endeavoured to press into a place reserved for the nobility, and was stopped by the Count de Kevenhuller, who being treated with impertinence, gave him several strokes with a cane. The affront produced a serious affray some days afterwards, the Ambassador’s train in revenge setting upon the Count in his coach, firing into it with pistols, and piercing it with swords, by which the coachman was wounded, and the Count scarce able to save himself. The guard arriving, the Spaniards retreated to the Hotel de Ville, where they defended themselves till two were disabled, and then yielded.

(w) Cotton’s Remains.

(x) Wicquef. 1. 393.

(y) Aitzem. L. 27. ap. Bynkersh. De For. Leg. c. 20.



The Ambassador flew to support his domestics, and endeavoured to force the *Hotel de Ville* where they were imprisoned, but failing, went to Court to demand reparation, which he did in such insulting terms, that he was himself put into confinement. In the end, instead of the punishment of the Spaniards, who had been guilty of the greatest outrage, a compromise was made. The Ambassador made excuses for his own passion towards the Emperor, for which he and his domestics were released, and the Count de Kevenhuller declared upon his honour that he did not know that the person whom he originally struck had belonged to the Embassy. (2)—In 1654, M. De Bass, Minister from France to *Cromwell*, was accused of a conspiracy against his life. The Council endeavoured to make him undergo examination, but he refused, saying, “that although he would communicate with Cromwell personally, and prove to him that he was not privy to the design; yet he would not submit to interrogatories before a Judge; for being a public Minister, he would by so doing offend against the dignity of his Master, to whom alone he was accountable for his actions.” The Council retired to consult what was to be done with him, and he persisting in his refusal to answer, they contented themselves with ordering him to depart the country in four and twenty hours. (a)—In the reign of CHARLES II. the *Spanish* Ambassador, enraged at the approaching match with *Portugal*, endeavoured to raise a sedition in the army, and the people, by scattering inflammatory papers among them; at which the King was so incensed, that he ordered him to depart the realm, and told him that he would send a complaint to his Master, “from whom he would expect that justice should be done him.” (b)—Even

(2) Mem. Touch. les. Ambass. 237.

(a) Thurloe's State Pap. 2. 351, 437. Wicquef. 1. 396.

(b) Lord Clarendon's Life, 90.



the Turks have sometimes acknowledged the doctrine we are discussing.—In 1646, the Ambassador at *Constantinople*, was summoned by the merchants before the *Divan* to answer some complaints. The Ambassador representing his privilege, the Grand Vizir said, “ he was aware that it was a thing unheard of “ to summon an Ambassador before the Divan, which “ would destroy the rights of Ambassadors, and the “ Law of Nations.” It is true, he was afterwards arrested and sent home, but that being solely owing to the revolution in England, and the arrival of a new Minister, has nothing to do with the point. (c)

And thus we have quoted a variety of examples which are in point to prove the principles we have adopted. They contain a number of *positive*, and some of them very serious breaches of the law of the country where the Ambassadors have resided, yet shew the fullest exemption from the power of the civil tribunal. Some authors, indeed, have allowed that they are exempt from answering for breaches of the municipal law, which they call “ *Malum prohibitum* ;” but insist that nothing can prevent them from being responsible for crimes against the law of nations, which are *mala per se*. Thus, says Lord Coke, “ If a foreign Ambassador, being prorex, commit- “ teth here, any crime, which is *contra jus gentium*, “ as *treason, felony, adultery*, or any other crime, “ which is against the Law of Nations, *he loseth the “ privilege and dignity of an Ambassador*, as unwor- “ thy of so high a place ; and may be punished here, “ as any other private alien, *and not to be remanded “ to his Sovereigne but of courtesie*. And so of con- “ tracts, that be good, *jure gentium* ; he must an- “ swer here. But if any thing be *malum prohibitum*, “ by an act of Parliament, private law, or custom “ of this Realm, which is not *malum in se*, *jure gen-*

"*tium*, nor *contra jus gentium*; an Ambassador residing here shall *not* be bound by any of them." (d)

This opinion, of *Coke*, is quoted, and reasoned upon as clear law, many years afterwards, when more accurate doctrines had been broached, by *Molloy*, treating of the Law of Nations; (e) and by *Comyns* treating of the Law of England, who gives it full place in his digest. (f) With submission, however, to my Lord *Coke*, it appears to me that he has not in these sentiments taken a very clear view of the subject. Treason, at least, which is a *positive* crime against the Municipal Constitutions of a State, and modified by the law of the land, cannot well be called a crime against the Law of *Nations*. And hence the opinion of *Hale*, as far as treason by the law of England is concerned, is in direct opposition to that of *Coke* and *Comyns*; he contending, that if an Ambassador even stab or poison the King, and death does not ensue (than which nothing can be clearer proof of treason, if it were the case of a subject) though he agrees he may be punished, yet it shall be only as an enemy, not as a subject. (g) *Hale*, indeed, affirms with them, that by the law of England, he may be tried for *other* crimes, which are also against the Law of Nations, such as *murder*; and that opinion we shall presently have occasion to examine. In the mean time we observe, that the authorities of the Civilians quoted, whether they relate to the law of England, or of other countries, go to the most complete and general exemption, let what will be the crime committed; and the cases cited to support those authorities, contain strong instances of *treason*, *felony*, and even *murder* itself.

(d) 4th Instit. 153.

(e) De Jur. Marit. 139.

(f) Comyns Dig. Art. Ambass.

(g) Hales Pl. of the Cr. 1. 97.

There is, however, one case on the records of Europe, which seems to militate against the doctrine in question, and which we should be unjust to our subject if we did not examine. It is that of *Don Pantaleon Sa*, brother to the *Portuguese* Ambassador in England, in the time of Cromwell, who was indicted, tried, found guilty, and executed for an atrocious murder.

Of this case I shall first relate the facts, and afterwards the opinions upon it which many lawyers and Civilians have entertained. On the first of November, 1653, *Sa*, and two others of the Embassy, talking of some matters in the new Exchange, were set right as to a fact by one Colonel *Gerhard*. One of them gave him the lye, and a scuffle ensued, in which *Gerhard* was severely wounded, and would have been killed, had it not been for another gentleman, who drew in his defence. The Portuguese resolved upon revenge, and a more atrocious or deliberate scheme could not be devised. They came on the next night, to the number of fifty, to the new Exchange, armed with swords, pistols, and coats of mail and attended by two or three coaches with ammunition, consisting of hand grenadoes, bottles, and little barrels of powder, and bullets. Their scheme seems to have been, to have murdered every one promiscuously; being said to have put every one to flight, and to have pistoled, cut, and wounded many! In this situation, a Mr. Greenaway coming to see what was the matter, they shot him through the head, and wounded Colonel Mayo, and Messrs. Howard and Carter, who were passing by. It was not till this time that the horse-guards came and took several of them to prison, the rest retiring home *firing at the guards*. The Ambassador was afterwards required to deliver up others of the delinquents, which he complied with, and his brother was among them. He interceded for his brother, but *Cromwell* resolved,



if he could, to try him by the Law of the Land. (*h*) He, therefore, consulted the most eminent of the professors of the civil law, to settle *how* such a barbarous murder might be punished. But these, disagreeing among themselves, he left the decision of the affair to a court of delegates, consisting of the Chief Justice, and two other Judges, three Noblemen, and three Doctors of the Civil Law. Before these, *Sa* was examined. At first he was supposed to be a colleague in the Embassy, and he vaunted himself that he was the King's Ambassador, "and subject to the jurisdiction of no one else," He was made, however, to produce his credentials, by which, all that could be proved was, that the King *intended* in a little time to recal his brother, and to give him a commission to manage his affairs in England. This being judged insufficient to prove him an Ambassador, he was, without any farther regard to the privilege of that character, ordered, as well as all the rest, to plead to the indictment.

Such is the accurate statement of the affair till it came to a Jury, as it appears from the account of Zouch, a Civilian of eminence, and himself a delegate in the cause; (*i*) and I have been thus particular in these preliminary steps of it, in order the better to ascertain what was the real opinion of the English lawyers upon the main point in question. For I think it is evident, from this account of the matter, (and one of more authority can hardly be met with), that had *Sa* been actually *Ambassador*, instead of forming part of the *suite*, the proceedings against him would have been the same with those in the cases cited above. All, therefore, that can fairly be drawn

(*h*) This account is taken from Lord Somers Tracts, 10. 65. et inf.

(*i*) Vide Zouch. Solut. Questionis. de Leg. delinq. Jud. Compet. in præf. *Sz* was tried by a Jury under a Commission of Oyer and Terminer. Hale Pl. of the Cr. 1. 99.



from *this* precedent, as to the decision of the then existing law of England is, that the *suite* of an Ambassador, if they committed murder, were liable to be tried for it by the Courts of the Country. *Zouch* asserts expressly, that his own opinion upon the main question, founded upon *Grotius*, and the *best authors* agreed with them as to the exemption of Ambassadors themselves; and it should appear, from his *Solutio Questionis*, that if *Sa* could have proved that he was an actual *Ambassador*, his plea before the delegates would have been allowed. In the course of his work also, he examines the Bishop of *Ross's* case, and the opinions of the English Civilians upon it, so often cited, and blames those opinions in the most unequivocal terms. It is true, it ought to be observed, that he differs from *Grotius* in his opinion, on the immunity of the *suite*, but as that point is not now before us, I shall not, by endeavouring to settle it, interrupt the course of the present reasoning.

An attention to the particulars of this nice case, as thus recorded, will probably lead us to review the opinions upon it, entertained by men of the very first authority in the law of England, with considerable caution; though it is not but with extreme diffidence that we venture at any thing like an examination of the sentiments of *Hale* and *Foster*. Nevertheless, supported as we are by such a number of clear cases demonstrative of the Law of Nations on the other side; and more particularly by this account of the circumstances of *Sa's* case, the only one on which *Hale* has relied; we cannot help suspending our judgment, notwithstanding the opinions of those great men. Lord *Hale*, in that part of his work which treats of the proceedings authorized by the law of England against Ambassadors, rests the whole upon cases. Upon these cases it is, that he relies for authority in saying that an Ambassador committing treason can only be treated as an enemy, and not  
tried

tried as a subject. Upon this one case (of S<sub>A</sub>) also it is, that he founds his position, "That if the Ambassador, or his associates, commit any other capital offence, as *rape*, *murder*, or *theft*, they may be proceeded against by *indictment* in the ordinary course of justice, as other aliens committing like offences." (k)

But if we are right in what we have shewn to be the true extent of the precedent of S<sub>A</sub>; though it may apply to the *associates* of an Ambassador, it cannot apply to the Ambassador himself. For authority to try him for *rape*, or *theft*, *Hale* quotes no case at all.

*Foster*, in one sense, goes not so far, in another goes farther than *Hale*, in the deduction of his opinion. He goes not so far, inasmuch as he does not quote a particular case as the ground of an opinion, which it will not warrant in all its extent. He goes farther, in resting his sentiments upon *general* reasoning, drawn from the abstract subject, which never can be precise or fixed enough, if destitute of cases, to say what is and what is not the municipal law. "But for murder," says he, "and other offences of great enormity, which are against the light of nature, and the fundamental laws of all society, the persons mentioned in this section, are certainly liable to answer in the ordinary course of Justice, as other persons offending in the like manner are. For though they may be thought not to owe allegiance to the Sovereign, and so to be incapable of committing *high-treason*, yet they are to be considered as members of society, and consequently bound by that eternal universal law, by which all civil societies are united and kept together." (l)

(k) *Pleas of the Crown*. i. 99.

(l) *Foster's Crown Law*, 188.

This reasoning, if considered merely in the abstract, and applied to a subject which was, *Res Integra*, is excellent. As applied to municipal constitutions, or even to the *Law of Nations*, as far as custom is concerned, it can *prove* nothing. For though no one can deny its soundness as a general rule, yet he shews no cause why exceptions may not be made to it, even for the purpose, namely, the benefit of society, which is the very foundation of its soundness. That there may be cases, in which persons offending against the light of nature, may, and ought to be suffered to be exempt from trial, we have already endeavoured to shew in treating of the inviolability of *Sovereigns*; but this reasoning would apply equally well, *if it was supposed to be universal*, against the immunity of *Sovereigns* themselves; “for they also are members of society, and consequently bound by that eternal universal law by which all civil societies are united and kept together.” If therefore it be said, without any statute quoted, or any case recited, that an Ambassador may be tried in this country for murder, solely because it is a crime against the *light of nature*, and the law of the land punishes murder in other foreigners; with equal truth it ought to be said, that the *Sovereign* may be tried for murder, which he cannot be. From any thing therefore, which *Foster* has laid down concerning this point, there is nothing in it which appears so universally binding, as to preclude *all exception*; and that the case of an Ambassador committing murder *was not an exception*, should have been proved by cases, which *Foster* has not endeavoured to shew. Whereas, there are against him both reason and cases, which we have shewn, and we may perhaps therefore be not far wrong in considering these tenets, *to be not sufficiently made out* as forming part of the law of England. (m)

The

(m) Blackstone, mentioning this doctrine of *Foster*, observes that formerly it was upheld both by our common lawyers and civilians.

The great difficulty seems to be, in being able to reconcile how it can be possible for a man, guilty of so atrocious a crime as murder, to be exempt from trial. This, however, is not actually the question. It is, simply, why he should be exempt from trial *in the country where he commits the murder*. For it is so far from being pretended that he should be *secure* from punishment, that it is insisted he should be sent home to be tried by his own laws; and in cases of crimes really against the light of nature, they would naturally provide for his trial, as well as those of the country where he committed the crime. Probably it may be urged, that his own master could have no cognizance of the affair, the murder having been committed *out of his jurisdiction*. In answer to this we may observe, first, that this will depend upon the particular constitution of his own country; secondly, that the Sovereign *having jurisdiction* in the country where the crime was perpetrated, waves his right to try him, in favour of his own Sovereign, and even demands that trial as a matter of justice; thirdly, that whatever may be the constitution of his own country, with respect to its jurisdiction over common subjects abroad, yet Ambassadors never lose their subjection to their own courts of justice at home, during their temporary absence; the whole of our reasoning being founded on this very circumstance, that they are allowed to be considered as *still* enjoying the protection of their own community, though dwelling within the bosom of another. And hence the children of an

civilians. He, however, quotes only common lawyers—Bulstrode, Rolle, Coke and Foster. The only civilians were probably the five mentioned by Camden in the case of the Bishop of *Ross*, whose authority as we have seen was impugned by *Zouch* in the next century. At any rate, Blackstone considers it as *Old Law*, and concludes that whatever may *formerly* have been the practice, this country, as well as the rest of Europe, seem, for a century past, to have pursued the opinion of *Grotius*. Comment. i. 253, 254.

Ambassador,



Ambassador, born during the embassy abroad, are allowed all the same rights which birth place could give them at home; and an Ambassador himself is supposed to enter upon all advantages that may have occurred to him while absent, without the intervention of the right of postliminium. It is therefore, by no means the intention of the law of nations, to confer a perfect indemnity upon an Ambassador committing a crime which is *malum per se*; but only to exempt him, *pro tempore*, from trial.

And thus we have endeavoured to examine this difficult subject, and to settle in particular, all the various interpretations which the case of *Don Pantaleon Sa*, is fairly capable of receiving. The result is, that however it may militate against the exemption from trial in the *suite*; yet it proves nothing, either one way or the other, if fairly attended to, with respect to the Ambassador himself.

Of all the other cases in which violent hands have been laid upon an Ambassador, (and there are many of them scattered up and down the various histories,) not one amounts to a regular trial; but they are either the consequence of sheer, undeserved violence, or punishments *via hostilitatis*, for attempts against the safety of the State. (n)

Much of what has been said, will discover the true way, in which the reason and custom of our ancestors have thought it right to proceed against offending Ambassadors; but as there may really be cases, in which there is not actually time to prevent the explosion of mischief that may have been contrived, unless the Government offended, takes upon itself to act, it has always been held lawful, or rather the necessity of the times has excused it in those cases, to interfere in a violent and forcible manner. Thus, in some cases, Ambassadors have been con-

(n) Vide Bynkerfh. De For. Leg. c. 18. ad. init.

fined to their houses; or beset with guards; or forcibly sent away; and, where the necessity is very urgent, they may even be put to death. But this has always been by way of *self defence*, not of trial or punishment; it has been, as it were, in open war, and as a declared enemy, authorised as such by the aggression of the Ambassador; never as a power claiming a regular jurisdiction to bring him to trial.

(c) It is exactly the same sort of case which we before contemplated, when we supposed an hereditary Sovereign, (who was therefore for ever inviolable as to law, under every crime he might commit,) to become a *monster*, and trample upon all the rights of the subject; in which case we held it allowable, (though allowable solely by the law of force, not of the constitution,) for the subject to destroy the tyrant if he could, without pretending to seize or to judge him, *by any juridical process*. It may, indeed, be compared to the case of a private man, who, in a well regulated country, being set upon by a thief or a murderer, it is allowable for him to resist, and even to kill him; but if he overpower him, he never can bring him to trial before himself, but must deliver him to the tribunals of the country.

Of these various manners of proceeding, there are many examples, some of which may be found in the cases already cited to prove the exemption from the municipal jurisdiction, and most of them are set forth at large in the writers we have so often cited. I shall therefore but mention one other, of modern date, and which happened in our own country. On the 29th of January, 1717, the Government of England having certain information of a conspiracy to in-

(c) Sane occidi poterit, non per modum pœnæ, sed per modum naturalis defensionis. Grot. D. J. B. et P. 2. 18. 4. 7. So also, Huber. De Jur. Civ. 3. 12. 32, 33. Quin etiam, si ipso facto vim inferant, vi illis resistitur, et si cadant, jure cæsi intelliguntur.

vade the country and dethrone the King, contrived by *Gyllenburg*, the Ambassador of *Sweden*, at that time at peace with Great Britain; they ordered the arrest of that minister, which was accordingly effected. General *Wade* and Colonel *Blakeney* to whom the charge was entrusted, found him making up dispatches, which they told him they had orders to seize; and they even insisted upon searching his cabinet, which, upon the refusal of his Lady to deliver the keys, they actually broke open. *Gyllenburg* complained of these proceedings, as a direct breach of the Law of Nations, and some of the Foreign Ministers at the Court of London expressed themselves to the same effect; upon which the Secretaries of State, *Methuen*, and *Stanhope*, wrote circular letters to them, to assign reasons for the arrest, which satisfied them all except *Montleone*, the Spanish Ambassador, who in his answer observed, that he was sorry *no other way* could be fallen upon for preserving the peace of the kingdom, than that of the arrest of a public Minister, and the seizure of his papers, which are the repositories of his secrets, two facts which seemed sensibly to wound the Law of Nations. (p) The observation, however, answers itself; since the confession that there was *no other way*, proves that this extremity was the simple consequence of those universal laws, which ever will and must overcome all other; I mean legitimate necessity, and self defence.

Upon self defence, however, a very grand question arises, namely, what shall constitute that sort of necessity which may authorise us to put a public Minister to death? Or, more particularly, how far in punishment we may proceed, according to the given

(p) Tindal. Contin. of Rap. The proceedings against *Gyllenburg* are quoted by *Bynkershoek* to prove his opinion. De For. Leg. c. 18.

circumstances of the case ? This question has formerly called forth very serious discussions from the Jurists, and some have gone so far as to say that an Ambassador may be put to death, because while alive, even though banished, it may be impossible to crush a conspiracy which he may have left behind him. (g) I confess, however, that I think it not only difficult to treat of this supposed case ; but that all discussion whatsoever about a matter so vague, is dangerous and chimerical. It is to destroy the whole fabric concerning the immunity of Ambassadors which has been raised ; for although that immunity is asserted in the most general terms, and in all cases except that of necessity, (which can never be foreseen !) yet we here see a set of predicaments, attempted to be laid down *before hand*, in which the immunity shall not have place. Ever to say *before hand*, what shall constitute the exact *particulars* of a case of necessity, is almost impossible : such particulars are omitted out of every code of law, from the very impossibility of foreseeing them ; for could they be foreseen, they would no longer form the case of necessity, but be provided against by the law. On the subject before us, there might be furnished a long list of varying opinions. One holds, that an Ambassador is to be punished for crimes actually *committed*, but not for those which are merely *projected*. Another, that although he is privileged, yet if he commit guilt, his privilege may be taken from him, and he may *then* be punished. A sophism which needs no comment. A third, that he is inviolable for crimes which are merely immoral, but not for crimes against the state ; that in the one case he must be sent back to his master, in the other retained for punishment, “ provided there is reason to expect that his master “ will not inflict it.” A fourth that he may be

(g) Barbeyrac. Not. 1. ad Bynk. For. Leg. c. 24.

punished,



punished, “ provided there is no great necessity to “ cultivate the friendship of his Sovereign.” (r) All this, it is obvious, is too vague to come under any thing like one certain rule or measure, and it would be vain to consider it as any part of law. Much better therefore will it be to content ourselves with the opinion of Van Bynkershoek upon the subject, that the only case in which we may fairly *kill* an Ambassador is when we really cannot save ourselves without it—a case which he farther illustrates by supposing this Minister himself to be armed against us and to die in open tumult. (s)

So much then for the inviolability of Ambassadors themselves. The exemption of their *suite*, is a question not so generally decided. It is, however, to be found fully laid down in *Grotius*, who upholds it in express terms; (t) is followed by *Wicquefort*, (u) *Huber*, (v) *Bynkershoek*, (w) and *Vattel*, (x) and is supported by numerous cases. Of those that have been already cited, the cases of the domestics of *Rockpot*, of *Sully*, of *De Thou*, and of the Spanish Ambassador at Vienna, are exactly in point; and hence therefore, when at the Congress at *Nimeguen*, in the last century, the assemblage of so many privileged persons as composed the trains of the Ambassadors might have been detrimental to the peace of the city, it was agreed by the Ambassadors themselves, that they should wave their right to protect their servants, and the magistracy of the town was allowed, *by consent*, to do justice among them. (y) At the same time the law of England seems to have

(r) Vide Bynkersh. De For. Leg. c. 24.

(s) Sed sere semper res aliter salva esse potest, si non manu apud legatus, et tumultuaria caede succumbat. De. For. Leg. c. 24.

(t) D. J. B. et P. 2. 18. 7.

(u) De l'Ambass,.

(v) De Jur. Civ. 3. 12. 28.

(w) De For. Leg. c. 20.

(x) L. 4. S. 120

(y) Temple's Mem. 167: 1679.

made an exception to it, in criminal matters, in the case of *Sal*, and the opinions of *Hale*; and I find one other strong exception to it, in a remarkable transaction in Spain, in the sixteenth century.

A criminal at *Madrid* in the time of Philip II. having escaped from Justice, took refuge in the house of the Venetian Ambassador, and was pursued by an officer, who was told from a window by the Ambassador himself to enter the house, but who was immediately set upon, ill-treated and driven away by the gentlemen and servants of the embassy. The Officer complained to the President of *Castile*, who took information of the whole affair, and ordered the Provosts to send and seize the delinquents. Hearing that they were to be resisted, the Provosts, instead of sending, went themselves, and upon entering, found the Ambassador armed with sword and buckler, and the whole suite prepared to oppose them. They nevertheless *without violence*, contrived to amuse the person of the Ambassador, while their officers seized several delinquents, among whom was *Badoara* one of his relations. These were tried by the tribunals of the country. *Badoara* was condemned to be beheaded; several valets to be hanged; and others to be flogged; and the king wrote to the Republic of Venice, and to all other Christian Powers, acquainting them that his will and desire was, "that when  
" his Ambassadors committed any crimes unworthy  
" of their station, they should be stripped of their  
" privileges and judged by the laws of the kingdom  
" where they resided." (z)

This case is as strong as it is possible to be against the positions in question. It is to be found in *Anthony Vera's* *Parfait Ambassadeur*, and *Wicquefort* endeavours to shake its authority by saying he never met with it in any other history. It is however also to be found in *Wotton's* account of *Christendom*, (a)

(z) De Callieres *Man de Negoc.* 2. 294.

(a) *Fo.* 211.

and the Legatus of *Frederick Marflaer*. (b) *De Callieres* seems content in thinking that justice was done, and yet “the dignity of an Ambassador preserved.” (c) But according to all the foregoing reasoning, whatever may have become of the Ambassador himself, it must be confessed that the whole law concerning the inviolability of Embassies as we have reviewed it, was absolutely destroyed. All then that we can fairly say upon this, and the case of *Sa*, is, that the one happened before the doctrines which relate to the suite were well understood or disseminated; and that the other forms an *exception* to the general usage, which will not impugn the general law. Since, according to the observation of *Bynkershoek*, upon one of these very examples, “one single decision, of one single State, cannot do away the Law of Nations itself.” (d)

I cannot quit this interesting and remarkable subject without observing, that the privileges in question have been carried by some to an extent even greater than that which we have been examining. In the Treatise of *Vattel*, we find the following positions:—That although the Sovereign to whom an Ambassador is addressed, is particularly called upon to protect him in his privileges; yet that the same duty extends to other Sovereigns to whom he is not addressed, but through whose country he is obliged to pass for the purposes of his mission. To insult him, says *VATTEL*, is to affront his master and his whole nation; to arrest him, or to offer violence to his person, is to wound the rights of Embassies which belong to every Sovereign. (e)

This doctrine arises out of some considerations upon the case of *Rincon* and *Fregoze*, Ambassadors

(b) Lib. 2. Diff. 13.

(c) De Call. ut sup.

(d) Sed una unius Regis sententia. non efficit Jus Gentium. De For. Leg. c. 19.

(e) Vattel. 4. 7. 84.

of FRANCIS I. of France, the one to the *Porte*, the other to *Venice*. These Ministers passing down the *Po* in their passage, and being suspected of bearing dispatches prejudicial to the interests of the Emperor *Charles V.* were set upon and murdered, apparently by the orders of the Governor of Milan. But the Emperor, although at that time at peace with FRANCIS, appears not to have been inclined to punish the authors of the murder. Upon this transaction *Vattel* observes, that it was an atrocious attempt against the Law of Nations; that FRANCIS had not only a very just cause for war against the Emperor, but also to demand the assistance of *all other nations* in its support. For it was an affair, not of two individuals, who each of them supposed they had right on their side; but of *all States whatsoever*, who were interested in maintaining the rights of Embassy. (f)

It perhaps does not fall exactly within the scope of this Treatise, to examine whether this opinion is really law as it is received at present. But we may venture to observe, that in this position, *Vattel* stands sole. At least all the authors on the Law of Nations who have preceded him, after discussing the point at length, have come to a conclusion directly the reverse of his; and that which they have concluded, is supported by a great variety of cases, both of an antient and a recent date. Thus *Albericus Gentilis*, upon this very case of *Rincon* and *Fregon*, observes merely "Probrosum id Carolo fuisse." (g) Sed alia Questio est, adds *Bynkershoek*, de jure LIGATIONIS, alia de jure honestatis. (h) *Grotius*, who followed *Gentilis*, after having given his opinions at length upon the inviolability of Ambassadors, says expressly, that it is only to be understood to be binding on those Sovereigns to whom they are sent, "Non

(f) *Vattel*, 4. 7. 84.

(g) *De Legat.* 2. 3.

(h) *De For. Legat.* c. 2.



“pertinet ergo hæc Lex ad eos per quorum fines, “*non accepta venia*, transeunt legati.” (i) It is true, the *non accepta venia*, may be made by some to amount to an inviolability, *provided they have passports*. But it may be fairly questioned, whether the possession of a pass-port itself, can confer any thing more, than the common protection to which common aliens have a right. *Bynkershoek* at least, without taking notice of pass-ports at all, understands *Grotius* to mean, generally, that the privilege in question shall not have place in countries to which Ambassadors are not addressed (k). Of this opinion also, were *Zouch*, (l) *Wicquefort*, who has been deemed the very champion of the rights of Ambassadors, and who decides that the case of *Rincon* and *Fregoze*, though an atrocious murder, was *not* a violation of the Law of Nations, as to Embassies; (m) *Huber*; (n) and lastly, *Bynkershoek*; who had particular occasion to examine the point, but a short time before *Vattel*. (o) The subject came before the latter in considering the meaning of the passage, “*Heir te lande, komen de, residerende of passe-rende*,” which formed part of a declaration of the States General in favour of the inviolability of Ambassadors; and the difficulty was, to know whether the word, “*Passerende*,” was applicable to Ambassa-

(i) D. J. B. et. P. 2. 18. 5.

(k) De For. Legat. c. 9.

(l) De Jur. Fecial. 2. 4. 18. ap. eund.

(m) De L'Ambass. 1. 433. 439.

(n) De Jur. Civ. 3. 12. 28. Obligatio autem de non violando, duntaxat inter mittentes et eos ad quos mittuntur legati intercedit ad tertium non pertinet. Qui proinde contra Jus Gentium non peccat, Si hostilia meritos tanquam hostes accipiat, iisque damnum aut exitium inferat, cujus rei exemplum historiæ multæ suppeditant.

(o) The Treatise De Foro Legatorum, was written on the occasion of the Arrest of the Duke of Holstein's Minister in Holland, 1720, and was published 1721.

dors to *other* powers, *passing through* Holland, or confined simply to those addressed to the States, coming, residing, and passing away, or retiring. To solve this difficulty, he enquired into the opinions of the Jurists concerning the point in discussion, and determined that it applied solely to Ambassadors who were addressed to the States. (p)

These authorities are also supported by abundance of cases, of which, exclusive of that of *Rincon* and *Fregoze*, which authors, as we have seen, have contended did not amount to a violation of the Law of Nations, I shall also select the following.

HENRY II. of France sending the Marechal de *St. Andre* to EDWARD VI. of England, the Queen of *Hungary*, who governed the Low Countries, endeavour to take him on his return, between Dover and Calais. There was at that time peace between *France* and *Spain*, but HENRY soon after published a memorial of grievances against the latter, among which he mentions this attempt against his Ambassador, as a breach of the peace. He, however, does not make it amount to a violation of the *Law of Nations*, because *St. Andre* had not been addressed either to *Spain*, or to the low countries, as *Ambassador*. (q)—SELIM II. in the sixteenth century, being at peace with *Venice*, but meditating war, sent a Minister to the King of *France* to know his sentiments of it. He endeavoured to pass through *Venice*, but was arrested, and the French Ambassador there, and the King himself, claimed his liberty as addressed to *them*.—But they were forced to yield to the arguments of the Republic; “that a sovereign power need not  
“recognise a public Minister as such, unless it is to  
“him that his credentials are addressed. (r)—The Republic of *Poland*, having elected HENRY Duke

(p) De For. Legat. c. 9.

(q) Wicquefort, 1. 177.

(r) Wicquefort, 1. 177.

of Anjou to be their King, sent Ambassadors to *France* to announce his election. As it was against the interests of the *Emperor*, they feared that passports through *Germany* would be refused them, and they therefore set out without them. In their way through *Saxony*, however, they sent to demand a pass-port of the Elector, *who notwithstanding they were Ambassadors*, expressed his surprise that they should attempt to pass through his country, and ordered them to be detained. (s)—In 1572, ELIZABETH of England, having reason to be jealous of the machinations of the French in *Scotland*, arrested all Frenchmen passing through the kingdom to that country without pass-port. Among these was *Du Croc*, the French Ambassador to *Scotland*, and his Court complained loudly of this as a violation of the *Law of Nations*. But *Walsingham*, the Secretary, pleaded, that as it was *Du Croc's* own fault for not taking a pass-port, he might justly be detained, and with this plea the French were content, notwithstanding his quality of *Ambassador*. (t) In 1603, *Gregory Barbarigo*, being sent Ambassador from *Venice* to *Great-Britain*, stopped in his passage in the State of the *Grisons*, the ally of *Venice*; and having business with the French Ambassador, he remained there for some time: but his expences and festivities not suiting the chastened simplicity of the *Grisons*, they ordered him to retire. A question, says *Wicquefort*, arose upon this, whether it was not a breach of the *Law of Nations*, which, (*Barbarigo* not being addressed to the *Grisons*,) he determines in the negative. (u)—Again, it is a part of the privileges of Ambassadors to be covered of right before crowned heads.—In 1641, the *Portugal* Ambassador to the *States*, passing through *England*, demanded audience of the

(s) Id. i. 188.

(t) *Wicquef.* i. 439.(u) *Wicquef.* i. 172.



King: It was granted, but upon condition that it should be as an *individual*, not as Ambassador, and consequently that he could not be allowed the usual ceremonial. (*w*)

These cases, which are thus both the effect and the support of the above-mentioned authorities concerning the inviolability of Ambassadors passing through third States, are in direct opposition to the opinion of *Vattel*; and it is not a little remarkable that that writer, although he quotes the case of *Rincon* and *Fregoze* as a kind of *vehicle* of his opinion, has not fallen upon one as an authority for it.

I cannot finally conclude this history of the doctrine and precedents concerning inviolability, as upheld in former times, without taking notice of the celebrated and interesting case of the unfortunate Queen of Scots. As this produced the greatest question that was agitated during the sixteenth century, or perhaps in the history of Europe, has much reasoning on both sides, and few or no examples of this sort either before or after it, I shall make no apology for going into a full review, not of the crimes or innocence of MARY, but of the right of ELIZABETH to put her to death, and the extent of the precedent formed by the transaction. And herein I shall confine myself strictly to the case as it actually happened.

In 1567, MARY Queen of Scotland, in her own right, having married Bothwell, Duke of Orkney, a man of known profligacy and daring ambition, who had murdered her former husband, and was endeavouring to get into his possession the person of JAMES, Prince of the kingdom; many nobles of the realm conspired against him, and associated for the defence of JAMES. In the manifesto which they put forth they disclaimed all violent intentions against their



lawful Sovereign MARY and professed to take arms solely against *Bothwell*. The event of their undertaking was the flight of their enemy and the imprisonment of the Queen, whom, being thus in their power, and having no lawful authority to do so, they resolved to depose. Equally destitute of such authority, they assumed the title of the *Lords of the Secret Council*, and without any other right, arrogated to themselves the whole regal power.—MARY, under duress and impressed by various Lords and the English Ambassador, with the notion that deeds made in such a case were void in law, signed certain instruments by which she surrendered the whole of her authority to her Son, and constituted the Earl of *Murray* Regent of the kingdom. The Prince was crowned in form; the government was thenceforward carried on in his name, and a Parliament was summoned in which the resignation of the Queen was declared valid, and the whole of the proceedings against her pronounced to be lawful. In this situation of things she escaped out of prison, assembled an army, and declared that her resignation was extorted from her by force. This was confirmed by a council of her Nobles, who pronounced, in consequence, that all the proceedings against her were illegal. She afterwards fought and lost the battle of *Langside*, and having been previously invited by Elizabeth, (x) who promised to give her the recep-

(x) " She sent John Breton first to her (*Elizabeth*) with a diamond, which she had before received from her in token of mutual kindness, to let her know she would come into England, and crave aid of her, &c. &c. to whom Queen Elizabeth most largely promised all the love and kindness of a sister." *Camd* 109. So also, in another place, " The Queen had, by Henry Middlemore, made her a large promise on the word of a Prince, of all courtesy and kind hospitality, &c." *Id.* 370. See also Anderson's Collections, 4. 2.

tion of an *Ally* and a *Queen*, took refuge in England, and was publicly received at Carlisle. (y)

Being thus in the power of *Elizabeth*, great debates were instantly held concerning the manner of her disposal, the leading features of which, and the considerations drawn up in writing for the better guide of the chief Counsellors, will assist us much in our judgment concerning the real ideas which were entertained of her. As soon as she was at Carlisle, it was thought wise that no one should be allowed to come to her without the knowledge of "those who had the charge of her," and that all Scotch Noblemen of the French party coming into England should be "*stayed*." It was also resolved, that if the party which had deposed her should demand to have their cause heard by the Queen of England, it should be granted, upon the ground of "the antient prerogative of the Crown of England" "to take cognizance of any controversy moved concerning the Crown of Scotland;" that this was particularly necessary at this time, because the Queen of Scotland had heretofore openly challenged the Crown of England, "not as a second person after the Queen's Majesty, but afore her." It was determined that she should on no account be suffered to pass into France, because that might renew the league between that country and Scotland, to the detriment of England. It was determined, that if she remained in England, she should not be allowed her liberty, because, according to Camden, "as she" "was the very pith and marrow of sweet eloquence," she would use it to increase her party in favour of her immediate views upon the Crown, "without waiting for the death of ELIZABETH;" "and no man" "would think but that such a swete bayte would" "make concord between her and all her subjects in

(y) Roberts. Hist. of Scot. Bks. 4, 5.

"Scotland."

“ Scotland.” She was not allowed to retire back to Scotland, “ because England in time would be “ abased, and the Queen herself would not long “ have continuance.”—Sir Francis Knollys, one of the keepers at this time, of Mary, describes her as of a bold aspiring spirit, thirsting after victory, for the sake of which “ pain and peril seemeth pleasant to her, and wealth contemptuous and vile.” (z) She had asserted her direct title to the Crown of England before that of Elizabeth, and had always refused to ratify the Treaty of Edinburgh, by which that *pretension* was to be laid aside. “ Now what is to be “ done,” says Knollys writing to Cecil, “ with such a “ Lady and Prince, or whether such a Princess and “ Lady be to be nourished in one’s bosom, or whether it be good to halt, and dissemble with such a “ Lady, I refer to your judgment. If her Highness “ (*Elizabeth*) think it good to stay the coming of the “ French into Scotland; if her Highness think any “ peril toward her; if her Highness think any Princess or Potentates, or that any factious subjects

(z) Knollys’ account discovers much penetration and ability in himself, and is one of the best drawn characters of Mary, as to one part of her disposition, that appears upon record. “ And “ yit this Lady and Princess is a notable woman; she seemeth to “ regard no ceremonious honor beside the acknowledging of his “ Estate Royal. She sheweth a disposition to speyk motche, to “ be bold, to be pleasant, and to be very familiar. She sheweth “ a great desyre to be avenged of hir enemies. She sheweth a readiness to expone hirselfe to all perylls, in hope of victory. “ She desyreth motche to hear of hardiness and valiancy, commending by name, all approved hardy men of hir country, “ althoghe they be hir enemies; and she concealeth no cowardness evin in hir friends. The thyng that most she thirsteth “ after, is victorie; and it seemeth to be indifferent to hir, to “ have hir enemyes dimynished either by the sword of hir friends, “ or by the liberal promysis and rewards of hir purse; or by “ divysion and quarrels raised among themselves: so that for “ victorie’s sake, pain and peryll seemeth pleasant unto hir; “ and in respect of victory, wealth and all things seemeth to hir “ contemptuous and vyle.” Anderson’s Collect. 4. 72.

“ may

“ may conspire against her ; then I am sure she will  
 “ think it good policy, rowndly and plainly to assist  
 “ her own cause. I think it an honourable quarrel  
 “ in her Highness to expel the French, and the  
 “ easiest way thereto is to aid and countenance the  
 “ Regent (*Murray*) in time.” In another letter he  
 says, “ The cold dealing of the English will not  
 “ satisfy her fiery stomach, and that unless she be  
 “ removed *as a prisoner*, she will not go farther into  
 “ the realm.” (a) The privy Council, in their memo-  
 rial on the subject (June 20, 1568,) also assert the  
 prerogative of England over Scotland, and accuse  
 her vehemently of a design upon the English throne.  
 “ What contracts,” say they, “ what promises,  
 “ what aids, what oaths, can be imagined to with-  
 “ stand her appetite to this crown.” This they again  
 ground upon her former strong assertion of her pre-  
 tensions, and her refusal to ratify the Treaty which  
 had settled them. (b) Hence, according to *Camden*,  
 they resolved to treat her as a prisoner, and actually  
 detained her “ *as taken by the right of war.*” (c).  
 The injustice of this was resented by many of her  
 own subjects in Scotland, who, in a spirited remon-  
 strance sent to Elizabeth, told her how much it was  
 against her princely honour to detain her *as a captive*,  
 “ and that other Sovereigns would find remedy there-  
 fore.” (d) At the same time she was treated in all  
 formal proceedings as a true and lawful Queen. In  
 the well-known commission given to the Duke of  
 Norfolk and others to enquire into the matters be-  
 twixt her and her subjects, she is called by Eliza-  
 beth, “ Our dear Sister and Cousin, Mary Queen of  
 “ Scots.” Her son, through the whole of the fa-  
 mous conferences at York and Hampton Court, is

(a) See *Camden*. 111, 113. *Anderson*. 4. 34 to 42. The above arguments are taken from papers in Cecil's own hand.

(b) *Anderson*. 4. 102 to 106.

(c) *Camden*. 111.

(d) *Anderson*. 4. 122.



styled by the English no more than “ the Prince her “ son ;” or, sometimes “ the Prince acknowledged “ King by the Nobles of Scotland ,” and after those conferences were put an end to, the Bishop of Ross was allowed to remain with proper credentials, as her Ambassador at the English Court. (e)

Now from these naked circumstances of the case, two things seem not unfairly to be implied : I. That the English Council (with what justice is not here the question) detained Mary from the first as *an enemy*, aspiring to the Crown of their Queen, fomenting and favouring the parties which were known to be adverse to her interest and security, and as such justly (*in their opinion*) liable to be imprisoned. II. That they considered her as a real Sovereign, and allowed her all the rights of an actual, though hostile and captive Queen. And hence I would argue, that the act of imprisoning her, at first disguised, but afterwards avowed and defended against all who concerned themselves in it, was a direct act of hostility of Elizabeth against Mary. “ I, for my part,” says the former to the French King, “ do detain the Queen “ of Scots in honourable custody, for the safety of “ England, and mine own security; and for it I have “ examples of the French, who shut up CHILPERIC “ in a monastery, Charles of LORRAINE in a deep “ dungeon, and SFORZA Duke of Milan in an iron “ grate, to secure their own estates. Finally, however, (she is obliged to confess,) such great examples as these do always carry with them some kind “ of injustice.” The conclusion of this celebrated affair was equally unjust on the part of the English, with its commencement. The Government, considering Mary as their most potent enemy, had long resolved upon her death ; but neither the temper of

(e) Id. 4. second part. 4. 14, 18, 33, 38. 3. Leslie's Negotiations.

England, nor the maxims of the world, would have borne them out, if by a barefaced use of the right of power, they had cut her off without deigning to assign a cause; they therefore coloured their intentions with the appearance even of law, and passed that well-known, and unjust act, by which the life of this unfortunate Princess was made actually to depend upon the deed of another, of whom she might absolutely know nothing, much less be privy to his actions. Seventeen years after her first detention, a law was enacted, by which, if any attempt was made against her Majesty's life, *by or for* any person pretending a title to the Crown, the Queen was empowered to nominate twenty-four persons to examine and pass sentence of death on the same; and if the attempt took effect, then not only those *by or for* whom the act was perpetrated, but their issues also, being any way privy or assenting to the same, might in like manner be pursued to death. (f)

It was upon this statute that *Mary* was tried and condemned; and, previous to the execution of it, it will not be uninteresting to consider the reasoning that prevailed at that time, in order to justify the intended severity of the English Ministry. So early as 1572, above fourteen years before her death, the Parliament had addressed the Queen to proceed *criminally* against *Mary*, as one who had attempted to disturb her government; (g) for which purpose they proceeded to a very full but inapplicable detail of reasons for her death, founded, not upon the right of the English to *try* her, but the necessity for punishment in ge-

(f) State Trials, 1. 103.

(g) Strype's Annals. 2, 134 to 137. The political severities of Burleigh and Walsingham seem there to preponderate over those of *Elizabeth* herself. The former, writing to the latter, when Ambassador in France, has these words: "Our news is, we are presently in hand to attain the Scottish Queen of Treason. And yet we fear our Queen will scant agree to it."

neral. They also built much upon that new ground which, as we observed in the beginning of the present Chapter, had in this century been taken as a foundation for very contrary public maxims among Protestants and Catholics. According to this, the Queen of Scots was treated as the adversary of God, and a conspirer against the gospel of Christ in all countries; and they quote, for a precedent, the execution of *Licinius* by "his fellow Emperor," Constantine, because he had laboured to subvert the Christian Religion. (*h*) In their petition also to the Queen, they call *Mary* "a Queen of late time, but now justly no Queen; a nigh kinswoman to her Majesty, but a very unnatural sister:" "And albeit," they continue, "upon her *first* coming, your Highness might, both by *law* and *justice*, have dealt with her *judicially*, for her attempts made, by writing and otherwise, against your Crown, yet she has had your Majesty's *most gracious protection*, and you have dealt with her like a good and natural sister." They then go on to petition, that if hereafter any attempt shall be made against the Queen by her, she may be adjudged to death as a *Traitor*, without any farther trouble of Parliament; and not only this, but if any attempt be made to deliver her out of prison, *she being assenting to the same*, the persons making the attempt, and *she herself*, may be in the same manner condemned. They then flatly deny that Sovereigns are inviolable, and quote precedents, which are vainly thought to bear them out in their ideas. (*i*) To the consideration of these we shall come in their proper place. Mean time, it requires little attention to be sensible of the extreme injustice, to call it by no harsher name, of attempting to pass a law for the

(*h*) D'Ewe's Journals. 208, 209. We shall soon see what the real case of *Licinius* was.

(*i*) D'Ewe's Journals. 215, 217, 218, 219. See also Strype's Annals. 2, 134, et infra.

death of a prisoner, shut up by the sole right of power, and upon political motives, in case she should endeavour to escape out of prison; nor is there any reader but must be struck with the inconsistency of this grave public body, when they assert that this injured woman had enjoyed the *protection* of Elizabeth, and therefore might be proceeded against for *Treason*.

In 1585 passed the fatal statute above mentioned. The Parliament *apprehending*, says *Strype*, that she was concerned in the conspiracies of Spain, moved for the taking her off; but men were not agreed as to the manner of it. The dark-minded *Leicester* proposed poison, and sent a Divine privately to *Walsingham*, to satisfy him that it was lawful; (*j*) but though *Walsingham* refused, and thereby saved his reputation, yet by supporting the conduct that was actually pursued, he probably did more real mischief, inasmuch as he promoted what at best perhaps can only be called a legal murder. In order the better to countenance this, a book was put forth to consider of the lawfulness of putting Mary to death as a Sovereign, all preliminaries being taken for granted, that she had really enjoyed the protection of England, had remained there at liberty, and had been guilty of the crimes alleged against her. In this book the following case was considered at large:

“ A Sovereign Prince, acknowledging no superiority, in distress at home, flyeth to the kingdom of his *Confederate*, being likewise a Sovereign Prince, and is by him received into protection; yet kept in safe custody, as having been a Competitor, afore of that kingdom, where he practised by open fact against the life and the kingdom of that Prince. Whether may such the practiser be therefore justly put to death?” (*k*)

(*j*) Camd. 346.

(*k*) Strype, 3, 299.



Upon this celebrated question, issue was joined by the civilians of the time, although it was easy to see, in the account that was published for the satisfaction of the people, what was the predominant spirit, from the scantiness of the objections, and the fulness of the answers. On the part of the Queen of Scots, it was contended,

I. That she was an anointed Queen as well as Elizabeth, and that *par in parem, non habet potestatem*.

II. That she came into the kingdom, subject only to the Law of Nations, and therefore not amenable to the municipal jurisdiction.

To this it was answered, that she had been deposed by her subjects, and therefore was not to be considered as a Sovereign; but that even if she were Queen of Scots in possession, yet she was a *feudatory* to Elizabeth, and consequently might be tried; that every Prince, not in his own territories, “parts with his inviolability in the country where he resides;” that it was known law, that all persons committing crimes were subject to be tried for them in the countries where they committed them; and that if a Sovereign coming into the territories of another, were not to be thus subject, his condition would be better than that of the lawful Prince; that with respect to the Law of Nations, it is denied that Queen Mary was only subject to them, since all aliens are subject to the *positive* law of the land, and that in matters of *Treason* there can be no difference of persons, whether Sovereign or not; that the nature of *Treason* is such, “as that the punishment thereof is not tied to any law;” that a King passing through another King’s realm, or there resident, is but a private person, and may commit *Treason* as another private man.

By this time, therefore, the case had assumed a new shape; and leaving out the consideration that Mary had from the first been treated as an enemy,  
and

and imprisoned as such, a doctrine was now set up which had not before been thought of by the Government, that Sovereigns in foreign countries should be considered as *common aliens*, and upon the supposition of having enjoyed the protection of the laws, should be deemed amenable to their power. To support this, the history of the world was ransacked for cases, wherein Sovereigns had been punished by fellow Sovereigns, although whether they had been punished *judicially*, or whether they were as perfectly independent as those who punished them, did not seem to come into the enquiry. Dr. Dale, however, (the same who had been consulted on the Bishop of Ross's case,) upon being again applied to by *Burleigh* for the satisfaction of her Majesty, gave it as his opinion, that nihil est in toto jure certius, than that the Queen of Scots having committed a crime in England, might there be judicially tried. (1)

Into the particulars of the precedents quoted we shall now proceed to enquire, and not one of them perhaps will be found to support the reasoning we have detailed. They were in number five; those of *Dejotarus*, *Licinius*, *Conradin*, *Robert*, and *Jean*; (2) the three latter, Sovereigns of *Naples*.

Of these the first is inapplicable, since *Dejotarus* was a *tributary* and *conquered* King of *Galatia*, and, according to the known custom of the empire, forced to submit to the Roman jurisdiction. He had besides been deprived of his dominions by *Cæsar*, for adhering to *Pompey*, although afterwards restored to a part of them. He was therefore every way inferior to the Dictator, and when accused of a design against his life, was called upon to answer for his crime, trusting to such equity in the form of trial as a conqueror chose to award him. We may add also, that

(1) Strype. 3. 365.

(2) Strype. 364 Append. B. 2. N. 1. Carol. 2. 371.

although

although the oration of CICERO, in his behalf, proves that he was called upon to answer, yet it was to Cæsar himself, and no sentence was passed in the cause. (n) The second case is still less applicable, since, whatever may have been the crime of LICI-  
NIUS, or the manner of his death, about which there is much obscurity, it is at least certain that he was no longer Sovereign when he was put to death. He had been conquered in open war by CONSTANTINE, had been deprived of a regal power, and had retired an humble individual to *Theſſalonica*, where, according to *Eutropius*, “contra religionem sacramenti, *privatus occisus est.* (o)” Upon the third case of *Conradin*, we have already observed much in another part of this work. (p) It will be recollected that he entered Naples in open war, and was conquered in battle. Although, therefore, he might have been proceeded against as an enemy, yet none but such ignorant and barbarous times could have allowed the propriety of proceeding against him by a judicial process. Even as it was, also, we pointed out that the transaction did not pass without censure on the ground of its irregularity; from the public lawyers of the time. (q) With respect to the case of JOAN, it would be wonderful how it could have been offered at all, had it not been necessary to blacken the character of MARY, by drawing a parallel between her and the Neopolitan, which was done in all due form by the Parliament, and offered to the Queen. (r) With the characters of these two Princesses we have here nothing to do.

(n) Middleton's Life of Cicero. 2. 215, 16.

(o) I. 10. 6.

(p) Vol. I. Ch. IX.

(q) Succaria, the most famous lawyer of his time, wrote a book expressly to prove this act of Charles to be against the Law of Nations. *Hist. de Sicile par Burigny*. 2. 174.

(r) See “The analogy or resemblance between Joan Q. of Navarre, and Mary Q. of Scotland.” *Strype*. 3. Append. 2.

With respect to the force of the precedent, it is well known that JOAN was executed *flagrante bello* by her conqueror, *Durazzo*, without any form of judicial process, and consequently it could not consistently be made the foundation for proceeding *juridically* against MARY. The remaining case of *Robert* was most relied upon by the Civilian, *Dale*, who lays great stress upon the opinion of Pope CLEMENT V. who reviewed and cancelled the judgment of the Emperor against him. The opinion is as follows: “*Quod si punitio*  
 “*criminis intra districtum Imperialem commissi, ad*  
 “*Imperatorem forsan pertinuisse asseratur; verum est*  
 “*quidem, si in eodem districtu fuisset inventus delin-*  
 “*quens.*” (s) If we examine, however, the case which gave rise to this opinion, we shall find it equally inapplicable to that of MARY with the rest. ROBERT King of Naples had opposed with an armed force the progress of HENRY VII. in Italy, upon which that Emperor resolved to depose him *as his vassal* who had taken arms against his superior Lord. For this purpose he assembled a council at *Pisa* in 1313, where, according to *Struvius*, *tanquam vassallum quod Florentinos, &c. &c. ad rebellionem concitaverit, et Pisanos Imperatori fideles infestaverit; ad Imperialem curiam vocatus, non comparaverit, proscrit, omnesque vassallos ac subditos a vinculo fidelitatis absolvit.* (t) In this transaction therefore we see the mere act of a Lord Paramount against a rebel subject; of a German Emperor putting his vassal to the Ban of the Empire. The reason why the sentence was reviewed by the Pope, was, because the sentence was passed in a country, not within the Imperial, but the Papal jurisdiction; and consequently the Emperor’s authority to pass any sentence at all, was questioned. With respect to his opinion,

(s) Strype. 3. 365.

(t) Struv. Corp. Hist. Germ. P. 9. S. 4, 14.



that if ROBERT's act of delinquency had happened within the Imperial territory, he might perhaps (*for-san*) have been subject to his jurisdiction, it is not only very faintly expressed, but the point must depend upon the fact, whether the Emperor held the King of Naples to be his vassal or not; and at most it can be taken but as a mere obiter dictum.

Such, however, were the ideas, and such the cases to support them, which were entertained by the English Statesmen and Civilians in the sixteenth century, upon this part of the Law of Nations. Yet the point was not so clear, even in those times, but that MARY was aware of the arguments that were to be brought against them: and we may remark, that the man who seems to have best understood the matter, that is, the most consistent and legitimate way of proceeding against her, was MORTON, her declared enemy, who, without seeking to colour the affair with pretexts which he probably knew were illegal, proposed boldly that she should be sent back into Scotland, and put to death (I suppose as an open enemy) in the very frontiers and borders of both kingdoms. (u) When MARY herself was called upon to plead to the jurisdiction of the Court which tried her, she asserted, with firm dignity, that "she was no  
 " subject, and would rather die a thousand deaths  
 " than acknowledge herself to be one, considering  
 " that by such acknowledgment she should both  
 " wrong the sublimity of Regal Majesty, and withal  
 " confess herself to be bound by all the laws of Eng-  
 " land, even in matters of religion." She afterwards objected to the statute that had been made against her, and asked the Commissioners by what law they intended to proceed; and so low in her estimation (possibly without much injustice) were the English Civilians, that she told them, if they meant

(u) Camd. 346.

to act upon the Civil or Canon Law, they must send for interpreters of it from *Pavia* or *Poitiers*, or some foreign Universities, for in *England* none fit for it were to be found. "If I am to be tried," says this dignified Princess on other occasions, "who shall be my Peers? Whereas the Queen writes, that I am *subject* to the laws of *England*, because I have lived under their protection. I answer, that I came into *England* to crave her aid and protection, and have ever since been detained in prison." HATTON, one of the Commissioners, told her, that her plea was bootless. "You say you are a Queen! Be it so. In such a crime as this, the Royal Dignity itself is not exempt from answering, neither by the Civil, nor Canon Law, nor by the Law of Nations, nor of Nature." BROMLEY, the Chancellor, made use of the same sort of language, but with little effect; and the only argument which overcame her firmness, was one peculiarly calculated to make an impression upon the mind of an innocent woman, (if indeed we can suppose her to be so!) anxious to clear her sullied reputation. Although she had refused to answer juridically as a subject, MARY had constantly expressed a wish that her conduct should be examined; and HATTON urging to her, that all were as anxious as herself to prove her innocence, and that by denying the power of the Court, she would give rise to the suspicion that she only meant to avoid examination, she yielded, tho', says Camden, "with much adoe and ill will, lest she should seem to derogate from her predecessors or successors." (w) The event is well known; and I have only to add, in order to complete the history of the facts of the case, that after many debates among the Crown Lawyers as to the designation of MARY, she was called in the record and the com-

(w) Camden. 348, 49, 50, 51, 52, 53, 54, 60, 61, 70, 71.

mission, "Mária, filia et hæres Jacobi Quinti, nuper Regis Scotorum, communiter vocata, Regina Scotorum, et Dotaria Franciæ." And this was "done because to have called her directly and precisely Regina Scotorum, could not well be warranted in law." (x) She was at the same time allowed to wear all her badges of Dignity and Royalty till after her condemnation, when they were stripped from her in form, by Powlett, her then keeper. (y)

Thus far, throughout this interesting transaction, we have studiously confined ourselves to the facts, and the reasoning of the times, as they actually happened, without going into that great question which here was so decidedly argued upon, "that a Sovereign, resident in the dominions of another Sovereign, may commit treason, and be tried for it, or any other crime, in the courts of the land." Upon that question we are now called upon to remark, and in our opinion, nothing was decided upon it in point of fact, by the case before us. For although, by an attention to it, as thus minutely stated, we may discover much *reasoning* for the *affirmative*, yet neither was any *fair* precedent quoted, nor does the case itself amount to one, if all the circumstances are considered. Mary had never been that free agent in the kingdom of her Sister Queen, so as to constitute the case of an Alien Sovereign protected by the Law and infringing it, which must always be supposed before we can go into the question at all. She had also, as we have seen, been detained prisoner from the first, by *right of war*; and under this view of the matter, it may be said to amount to no more than the case of a prisoner of war, detained always in prison, and assenting to an act against the life of his Conqueror;

(x) See Popham (Attorney General's) letter on this subject. *Strype* 3. 364.

(y) *Camd.* 369.

in which the true manner of proceeding against him would be in the summary way of martial law, without having recourse to the municipal courts of the country. Of this opinion was the Civilian Zouch, when, a century afterwards, he came to review this celebrated transaction; he holding expressly, that no Sovereign can be regularly tried in the courts of another Sovereign, although he may, upon provocation, be proceeded against in open violence, in the same manner as if he had remained at home, and war had been declared against him. And this he affirms, with reason, to be a full answer to the argument against the immunity of Sovereigns, that if it were allowed, the foreign would be in a better condition than the native Prince. (z)

The whole therefore, in our opinion, that the case of Queen Mary can in fact amount to as a *precedent*, is this; that a Sovereign Prince, in the territory of another Sovereign Prince, *detained by right of war*, and treated from the first as an *Enemy*, was, upon conspiring against the life of his Conqueror, put to death, by the decree of a Court expressly erected by law to watch over his attempts, and enquire into the truth of the facts. Whether it was necessary to erect such a Court by law, and for such a purpose, is another question; and, at any rate, to try an enemy, taken and detained prisoner by right of war, in the common Courts of the country, is too notoriously *irregular*, to need any comment at all. With respect to the question, whether a paramount Sovereign, *at peace* with another, *freely* residing in his country, and committing a crime either against the positive law of the land, or against the law of nations, is subject to

(z) Et si cum in territorio principis in quem conjurarunt deprehensi sunt, præsentis vindicta uti melius videbitur; juri gentium convenit pro hostibus declarare, unde, *non expectato judicio, cuivis* eos interficere *impune* liceat.

Solut. Quæst. de Jud. Leg. &c. &c. 84.



the municipal jurisdiction of that country; whether this was sound law, although it must be confessed that such was the length to which the English Government meant to carry it, the case in our opinion, decides nothing. For, whatever may have been the reasoning of the Statesmen, the Parliament, or the Judges; as *a fact*, it cannot be made to go farther than what has actually been stated. At the same time, that reasoning is left upon its own ground; and whether as an abstract proposition it is sound, or unsound, we pretend not to decide, contenting ourselves with having shewn, that, if it is the former, it is at least not supported by any *full* case in the history of the world.

Others again endeavour to throw the case of Mary entirely aside, by assuming all the way through, that she was in reality *not a Sovereign* when she came into England, or at the time of her trial; and of this opinion is Vattel. (a) I fear, however, that the facts will not support this sort of reasoning. The whole of what has been stated, shews very clearly, that Mary came into England an acknowledged Queen; and as such her Ambassador (*the Bishop of Ross*) at the English Court, was, even upon notorious delinquency, allowed his privileges.—As such also she was considered in all the reasoning of the Statesmen and Civilians concerning her; and her dignity was expressly acknowledged whenever those difficult questions concerning the right and manner of punishing her were discussed. And though the Parliament affected to call her “the *late* Queen;” and she was described at her trial merely as the “*heiress*” of King James, yet she enjoyed the respect and the

(a) Vattel. 2. 7. 108. Le fameux exemple de Marie reine d'Ecosse, que l'on voit si souvent allégué en cette matiere, n'y vient pas fort à propos. Cette Princesse ne possédoit plus la couronne quand elle vint en Angleterre, & qu'elle y fut arrêtée, jugée et condamnée.

badges of Royalty, and was not stripped of them till after her condemnation.—This manner, therefore, of considering her as a private person, is only calculated, I think, to elude the question which is generally founded upon her case; although it is certain that to those who can consider her as not acknowledged by the English, it will have the effect which Vattel supposes.

With respect to the main question, we are not here called upon to endeavour to decide it, although the opinions entertained upon it, it was our duty to relate. The tenor of these opinions in England we have already shewn; and it must be owned, that whatever may be supposed to have been decided at the time concerning the deposition, or the sovereignty of Mary, the Ministers and Lawyers of England held in the most decided terms, that a Sovereign, acknowledged as such, and residing freely within the territory of another, was liable to be punished for Treason by the courts of the land. Of this opinion also were several foreign Jurists, such as Hottoman and Arniseus. At the same time, the reasoning upon which they chose to rest, is liable to decisive objections; for the law of nations was then but little known; and all the arguments concerning it were taken from the civil law of the Romans, the inefficacy of which we shall presently have occasion to discuss. Thus *Hottoman* founds his opinion upon the Roman maxim, that a Magistrate, *out of his province*, is no longer inviolable; (*b*) as if any parallel could be drawn between a Sovereign Prince, holding his throne from no one, and liable to no jurisdiction, and a Subject Officer holding a deputed authority! It is right, however, to review a position of *Zouch* upon the other side, in which, probably, he trusts too much to the precedent he offers.—In defending the exemption of So-

(*b*) Ap. *Zouch* Solut. Quæst. 56, 57, 58.

vereigns from *trial*, he goes so far as to say, they are Sovereigns in a foreign country, even quoad their own jurisdiction in criminal causes. This he founds on a case contained in Fleta, in which *Ingelram de Nogent* being taken in the Palace of Edward I. of England, when that King was at Paris, for having stolen some silver plate, there was made a question concerning the person who was to try him; and, after some debate between the Steward of the English Household and the French Magistracy, the King of England was allowed the *privilege of his Palace*. If *Arniseus*, says *Zouch*, had been aware of this case, he would not so rashly have held that Sovereigns lost their privileges in a foreign country! (c) At the same time, from *Zouch's* own manner of relating this precedent, I think it is very doubtful whether it was determined for the foreign King, "as a known and universal custom," or whether it was not merely a concession, or compliment on the part of the French. The words are,

"Habitis tunc inde tractatibus, in Concilio Regis  
 "Franciæ consideratum fuit, quod Rex Angliæ illa  
 "regia prerogativa et hospitii sui privilegio, uteretur  
 "Et gauderet." (d)

It was agreed that the King of England *might* use and enjoy the prerogatives of his Palace!—At any rate, so weighty a matter cannot be disposed of upon the authority of a very imperfect and antient case, and which at best can only be the foundation of a collateral argument. *VATTEL* holds the same opinion with *ZOUCH*, both with respect to the *exemption* of a Sovereign from trial, and the enjoyment of his own prerogatives over his own subjects in the foreign State. Leaving the latter question, we can only observe, that the reason he contents himself with giving for the former, is far from satisfactory,

(c) *Solv. Quæst. &c.* 82.

(d) *Id.* 81.

if it may not even be turned against him. A Sovereign, says he, cannot be subject to the laws in a foreign country, “ Car on ne *presume pas* qu’il ait consenti à s’y soumettre !” he therefore holds that we ought to *stipulate* with him before hand, that he shall submit to the laws. (e) It is needless to point out, that if the whole depends upon the mere presumption of what is, or what is not the intention of the Sovereign, we may as well presume that he will, as that he will not submit to the laws. Vattel holds, with more reason, that if the Sovereign is guilty of any hostile act, he may be proceeded against as a declared enemy, in the same manner as if he had committed it out of the country. (f)

It may seem somewhat remarkable, as we have contended, in another place, so decidedly for the exemption of Ambassadors, who are but the representatives of a Sovereign, that we should not contend equally for the Sovereign himself? Upon this, however, we have to observe, that there is a great difference as to the cause for which one Sovereign visits the country of another. If he chuses, if I may use the expression, to be his own Ambassador, and comes to treat of national concerns, all the reasoning grounded upon the necessity for the communication of nations will apply in his favour, and here Vattel is also decidedly for him. (g) But if he comes as a mere traveller, or to take refuge, without any business to transact, whatever may be the real justice of the case; he is at least precluded from relying upon that part of the reasoning. He is also deprived of a much stronger argument in favour of Ambassadors, namely, that it is not the intention of the Law of Nations to exempt them altogether, but simply from a foreign jurisdiction; since if their crime be against the law of nature, it is natural to suppose that their own

(e) Droit des Gens. 4. 7. 208.

(f) Ib.

(g) Droit des Gens. 4. 7. 108.



laws will punish them : whereas in the case of a Sovereign, he is amenable to no law in his own country, and consequently the punishment demanded, cannot be executed. Upon the whole, the question, which has been called by *Paschal*, upon another occasion, “ *Anxia et nodosa*,” may be reduced to this; whether, if a Sovereign, being in a foreign country, “ upon no national business,” but on a mere visit of curiosity, or having taken refuge there, commit murder, or any other crime against the law of nature ; it is one of those cases in which the interest and business of the world are more benefited by letting him escape, than the support of the laws is weakened by waving the punishment !

What the Law actually is, or has fairly been upon this question, we profess not to determine. Throughout the case we have been reviewing, we have contented ourselves with stating at large the OPINIONS that were held, and the real extent of the precedent in point of fact. We have also reviewed the cases relied upon, and endeavoured to shew their total inefficacy. The reasoning on both sides we leave to the reader, simply observing, that if our sentiments upon the whole matter are just, there is at least no case in the history of the world, by which to support the general discussion.

And this will finish what we have to say upon this interesting subject.—Whether in the last case, the proceedings of the English Council were governed solely by their hatred, or their dread of Queen Mary ; or whether they bona fide believed their arguments to be founded upon the real Law of Nations of their time, it is perhaps not easy to determine with precision. Certain it is, that however from the various causes we have related, Europe may be said to have been improved in its maxims, much yet remained to be done. The hostilities of nations were  
still

still often carried on with the extremity of rigour, and when cases of nicety were started, the ignorance of men were still so great, that they generally fell into difficulty, and often into actions which cast a stain upon their honour. Of the latter, the behaviour of so generous a Prince as FRANCIS I. after the famous Treaty of *Madrid*, is a strong and eminent proof.—Every one knows the price which this King had paid to CHARLES V. for his liberty, after the battle of PAVIA. He agreed, amongst other things, to restore the Dutchy of Burgundy, provided he were first set at liberty, and stipulated that in case he failed, he would upon his honour and his oath return to Spain, and once more surrender himself prisoner to the Emperor. (*h*) Nothing could be clearer than the conduct which, under this agreement, he was bound to pursue; but as he foresaw a very unpleasant alternative, he fell upon a measure which nothing but the ignorance of the times (though comparatively so much improved) could even palliate. A few hours previous to the signing the Treaty, he assembled some of his friends, and after enumerating the arts and rigour which the Emperor had employed to procure his assent to such conditions, he made a formal protest in the hands of Notaries, that his consent was *involuntary*, and therefore void; and with the intention to break it thus warm in his mind, he immediately afterwards signed the Instrument. (*i*) Scarce was he set at liberty, but the consequence of such intentions was made evident. He joined in a league against CHARLES, with the Pope, the Venetians, and the Duke of Milan; and the former, proceeding upon the old Law of Nations, operated upon by the Ecclesiastical Institutions, made use of a power which had not yet been abrogated, (*k*) and as

(*h*) Recueil des Trait. 2. 112.

(*i*) Id. 2. 107.

(*k*) See Chap. XIII. p. 74.

the sole director of cases of conscience, absolved the French Monarch from his oath. (l) In virtue of this, and on other pretences, FRANCIS refused to execute several articles of the Treaty, and when the Imperial Ambassadors came to remind him of his obligations, he gave audience in their presence to some Deputies of the States of Burgundy, who stoutly asserted that at the time of making it, he had it not in his power to alienate the dominions of the crown, (m) At the same time he refused to return to prison, and these were the subterfuges of the most open and generous Prince of his time, to elude the performance of a Treaty which had restored him to liberty. The respect we have for him, make us wishful to attribute these unjust and inconsistent operations, entirely to the blindness of his age.

But the rigour of the laws of war during these times, was equally notorious with this ignorance in the interpretation of Treaties; and although there certainly were not those desolating signs of extermination which had marked the earlier wars of Europe, yet men had not yet by any means acquired that softness and polish which a more intimate acquaintance with their duty has since taught them. The Spaniards, partly from their zeal for catholicism, partly from the mere pursuit of their old maxims, continued to condemn prisoners either to death, or to the galleys. (n) The old maxim that no faith ought to be kept with heretics was enforced by Catholics against Protestants. In some countries, even *Christian*, (as in *Muscovy*,) it was supposed to be perfectly compatible with Christianity to commence war without any denunciation; (o) when Christians and Turks came

(l) Roberts, Ch. V. 2. 346.

(m) Id. 348.

(n) Rymer's Fœd. 16. 591. Camb. 123.

(o) Camb. 235. It was a Russian Tzar who ordered an Ambassador's hat to be nailed to his head, for insisting upon that  
part

came to be opposed together, their old cruelties seemed to revive; (*p*) and in the wars of the *Low Countries*, which broke out during the period before us, there was scarcely a transaction so savage, or a maxim so infamous, but found support and countenance from the Princes of the time. (*q*) At the same time this was the period of great improvements in the laws, and in the arts and sciences, in most of the countries of Europe, and every nation teemed with great men. (*r*)

It is not perhaps altogether impossible to account for this backwardness of the Law of Nations in comparison with other improvements. Mankind in fact, had not yet thrown off the trammels in which almost all knowledge had hitherto been held, and if we consider the manner in which public men, even the best intentioned, endeavoured to account for their public duties, we shall not be much surprised at their want of perfection in these particulars. It was not till the age of GROTIUS, that they began to be confirmed in the improved notions which the circumstances we considered in the last Five Chapters

part of the ceremonial by which Ambassadors are allowed to be covered before the Sovereign. (Lord Carlisle's Embassy to Russia.) With respect, however, to the necessity of declaring war. it is reprobated even in our own age, by Bynkershoek. *Quæst. Jur. Pub.*

(*p*) As at the siege of Malthe, where the Turkish General ript out the hearts of the wounded, and cutting gashes in the dead, in the form of a *cross*, tied them to planks, on which they floated with the tide to the town: and where the Grand Master in return, massacred all his prisoners, and putting their heads in cannon, shot them into the camp. *Watson's Ph. II. I. 213.*

(*q*) *Grot. Prolegom. 28.*

(*r*) It was the peculiar fortune of the sixteenth century to produce the greatest personages, perhaps, in the whole history of Europe. They were Ch. V. Fran. I. Bayard, Doria, Luther, Erasmus, Hen. IV. the Guises, Coligny, Sully, William I. of Orange, Parma, Gustavus Erickson, Sebastian, Elizabeth, Burleigh, Walsingham, Sidney, Essex, Raleigh, and Bacon.



had gradually introduced ; and we may probably be safe in affirming, that it is to his comprehensive mind and learning, that the law, as construed at present, has chiefly owed its distinguishing regularity. Of so great consequence are sometimes the silent exertions of the closet, to the more active and louder professions, which contend with it for the government of the world !

Wonderful however to tell, although the greater part of the ideas which he promulgated are so clear as to be beyond all refutation ; and so natural, that we are astonished (considering what has been related) that they were not adopted before, they were considered as new by the *Doctors* of the *time* ; and it was some years before they made their way into the minds of *Sovereigns*, the only persons who could give them effect.

To all these topics we are now hastening, and we have at length to consider the causes which gave rise to the Treatise of this celebrated man ; the manner in which it came to be disseminated ; the aid which it has met with since, from the publications of various learned persons ; and the ultimate and great effect which it has had, in bringing about the system which is followed at present. The deduction of these points will close our enquiries.

## C H A P. XVIII.

## THE AGE OF GROTIUS.

THE Law of Nations then about this period, was a vague and indeterminate phrase in every body's mouth, but with few precise ideas annexed to it. It consisted, as we have observed, in the various discussions we have had occasion to review, of a string of undigested precedents, the facts even of which were but little understood, so that they might be made to bend almost every way that suited the purpose of those statesmen who affected to take them for their guide. Little of science, drawn from general rules or analogies, was thought of; fundamental principles were sought for in very different sorts of spirit, and there being no clue, every thing was left on the hazard. Some recognized no law but that of the strongest; others, especially the lower orders, concluded that war put an end to all laws whatsoever; those who were more regular, pretended to be governed by custom, a thing in itself too variable and vague to stand alone, seldom amounting to that universality which can only give it authority, and at any rate often an authority for evil as well as for good.—Others, more philosophical, formed themselves in the schools, and allowed no weight to any one but PLATO and ARISTOTLE, although, according to Grotius, the truth to which Aristotle so much attached himself, had not more mortal enemies than those who made most use of his authority. (s) Those also of antiquity who were proposed for imitation, were followed as implicitly in their visions, as in

(s) Prolegom. 42.

their good sense. Others again, approaching nearer to the business of the world, intrenched themselves behind the civil law of the Romans, from which they never suffered themselves to wander. As if *Ulpian* and *Papinian* had been infallible, and had been sent down from Heaven to prescribe laws for all the world; or as if its various nations were always to find a certain rule of conduct for their intercourse with one another as independent States, in laws made for one integral community, which had long been so totally dissipated that few vestiges of its original people remained. Notwithstanding this, however the greatest public lawyers from the thirteenth to the sixteenth century, adjudged all controversies between nations by the rules of this celebrated law; and the errors of *Accursius* and *Bartolus*, which might be excused by the “*Temporum suorum infelicitas*,” (t) were followed on the same authority, by the two famous Spanish Civilians, *Covarruvias* and *Vasques*, in the very age of Grotius. (u) The general excellence however of this law was such, as to excuse the European States for the high deference which they paid to it: So high, indeed, that it has been said, that whenever our own ordinances and customs fail, “*Tunc ad Jus Commune et Romanum confugimus*,” for that in all uncertainty, the Roman law was a sheet-anchor by which to come to equity, the precepts and duties of civil life being no where so well laid down. (w)

Hence *Albericus Gentilis*, who bore the palm from all the Jurists before Grotius, and was Regius Professor of Civil Law at Oxford, (1585) (x) lays it down that all Sovereign Princes are bound to be governed by it, in the disputes which arise between

(t) Grot. Prolegom. 54.

(u) Id. 55.

(w) Beaver's Hist. of the Roman Law, 135.

(x) Zouch. Solut. Quæst. &c. 176.

them. (y) But at the same time this celebrated law was often calculated to lead nations into error. The Roman Empire, though so vast in its extent as to embrace a tract of country more than equal to Europe, had not been, like Europe, composed of different communities independent of one another; but formed one nation under a supreme Despot, whose will gave the tone of behaviour to every one of its members. We have seen into what mistakes this led many of the Civilians with respect to the power of the Emperor over other Princes.—It also, as we have shewn, affected almost all the earlier reasoning which concerned the important privileges of Ambassadors, the word *Legatus*, the Ambassador of a Sovereign Prince, being, as we observed, p. 312, after *Bynkershoek*, often confounded with the *Legatus* which meant the mere Deputy of a subject city to Rome, and consequently a subject himself.

In the debates between the French and English for the restitution of Calais, (1567) I find strange ideas of the Law of Nations. By the Treaty of *Chateau Cambresis*, it had been settled that *Calais* should remain in the possession of the French for eight years, and then be restored. The time having expired, officers were sent to demand it *according to Treaty*; but the possession was defended upon the principles of the Roman law. “By the same right,” said *Hospital*, Chancellor of France, “that the English demand *Calais*, they may demand *Paris*. The title of the French is as old as the kingdom itself. Though the English possessed it for two hundred and thirty years, yet the right was in the Kings of France, and that no less than the Dukedoms of Guienne and Normandy, which the English had detained long by force of arms. The prescription of time which they allege, doth not prevail among

(y) De Jur. Bell. c. 5.

“Princes,



“ *Princes*, but the *right* ever prevaileth; for according to the Twelve Tables, “ *The authority against an enemy is perpetual.*” (s) Here we see the whole clue of *Hospital’s* reasoning. The maxims of the world must have settled that whatever is fixed by Treaty, must be enjoyed as by positive consent; but the Roman law having also settled the “ *Adversus Hostem*” “ *Æterna Auctoritas*,” (a) it gave a colour and turn to the whole of the French reasoning.

I know not whether *Hobbes* had this *Æterna Auctoritas* in view, when he gave to the world his celebrated Treatise, in which he so much insists that the state of war is the natural state of mankind; but such a position was by no means calculated to improve the Law of Nations, or to bring men to any thing like a sense of what it ought to be. “ Every independent Commonwealth,” says this philosopher, “ *has a right to do what it pleases to other Commonwealths.*” And withal they live in the condition of a perpetual war, and upon the confines of battle, with their frontiers armed, and cannons planted against their neighbours round about.” (b) *Hobbes’s* book appeared but a little time before the Treatise of *Grotius*, and we may suppose how calculated such a fundamental maxim was, to improve the intercourse of nations.

Upon the whole then, during this time, the Law of Nations continued to be fluctuating in nearly as much uncertainty as ever, and was left, as we have seen, to be applied as it accommodated itself with the interest or caprice of those who were most concerned. And although men had become more enlightened, and saw the necessity of having some fixed principles which might govern *all* States, as

(s) Camden. 93.

(a) Cicero De Offic. L. 1. c. 12.

(b) De Cive, c. 2.

particular laws governed particular communities; still so many impediments arose, while thus divested of good general principles, from power, ambition, and even religion, (prevented as it was from its original simplicity,) that though a certain conduct in certain situations was obviously necessary, yet the reasons for it lay buried in obscurity, and it was rather to be hoped for than expected. (c) Hence so many cases whose arguments and decision appeared to clash together; hence a new doctrine upon almost every new system of politics, or whenever a new character appeared in the world; hence also the cruelty, bigotry, want of good faith, and chicanery which were every where practised, and which almost form the characteristic of the ages we have reviewed. It is said that our *Lord Bacon* was the first who perceived the imperfection of the *science* of the Law of Nations, and the necessity there was for the happiness of the world, that the rules which governed its conduct should be reduced to fixed principles. *Albericus Gentilis* had indeed put out a book which made something like the attempt, but not only it is not sufficiently general when left to itself, but he cramps himself by supposing the Roman law to be the Law of Nations: above all, he is accused of resting upon doubtful authorities, which were promulgated, not so much to settle the truth, as to flatter those who consulted them, and of leaving several very noble questions totally untouched. (d) Many of the same objections were to be made to *Balthazar Ayala*, to whom however, as well as to *Gentilis*, Grotius allows considerable merit. As for the other Jurists who had attempted to treat of this subject, such as *Victoria*, *Henry de Gorcum*, *Lupus*, *Aria*, and

(c) Artis formam ei imponere, multi antehac destinarunt, perfecit nemo. Grot. Prolegom. 30.

(d) Grot. Prolegom. 38.

various other, they, according to GROTIUS, de uberrimo argumento, paucissima dixerunt, and made no distinction between the natural or the positive, the divine or the civil, or the canon laws. (e)

This jumble indeed, which was made between very different sorts of law, was the stumbling-block, according to the great father of the science, of all those who had hitherto attempted to treat regularly of the Law of Nations. At the same time it is rather remarkable, that in his survey of the writers who preceded him, he makes no mention of *Suarez*, the clearest of all those who had attempted to discuss the law of nature, and the difference between it and the Law of Nations. Had he gone on to treat of the minutiae of that latter law, the labours of Grotius might probably have been much shortened. The extracts of this writer of the sixteenth century, may possibly be recollected by the reader in the First Chapters of this work. With all these objections to the Doctors of the time, are we to regret or not, that the Universities of England had put forth nothing upon the subject of this interesting science?

It was in the midst of this uncertainty about true principles, and this dearth of proper authorities, that the philosopher of *Delft* rose like a star amid the surrounding darkness, and with an ability and happiness peculiar to himself, had at once the honour of inventing and bringing his system to perfection: For he gave to the world a Treatise which has stood the test of time.

During the life of this great man, a civil war had desolated the finest provinces of his country, and like other civil wars which are continued to any length, had degenerated into the most horrible licentiousness and personal hatred. He had besides this, observed throughout the Christian world, a cruelty



and injustice of which, to use his own words, even barbarians might be ashamed. War was denounced upon the slightest, or without any cause at all, and arms once taken, all reverence for law human or divine was laid aside; "as if" says he, "an edict" had been published for the commission of every "sort of crime." (*f*) With many philosophers, this threw things into the other extreme, and the amiable and learned *Erasmus*, a man who is described as "*Pacis Ecclesiasticæ et civilis amantissimus*," endeavoured to prove that all wars whatsoever, were illegal under the Christian Dispensation.

GROTIUS saw the disadvantages of the two extremes, and he had well discerned the total want of science both in ancient and modern times, in the methods pursued to obtain a knowledge of the duties of Nations. He therefore resolved to give his labours to the improvement, or rather to the invention of a code of laws, which might go to the bottom of things, and supply authorities where authorities were wanting, to almost every case in the conduct of nations which could happen. And eminently qualified he was for this most noble and beneficial of all tasks. To the strongest mental powers, he added a learning which on almost every subject, and in every language was stupenduous, and supported it by the most indefatigable industry, a virtue incorruptible, and the purest zeal for Christianity.

The world are perhaps indebted to the misfortunes of this wonderful man, for the Treatise *De Jure Belli et Pacis*. Having entered warmly into the theological disputes between the *Arminians* and *Gomarists*, which arose about his time, he was involved in the well known oppression of the Pensionary *Barneveldt* and the *Arminians*, by the Prince of Orange. The *Gomarists* having shewn much disposi-

(*f*) Grot. Prolegom. 23.



tion to tumult and insurrection, *Barneveldt* procured a decree from the States by which the Magistrates of the different cities were permitted of their own authority to levy troops for their protection. This alarmed the Prince, who conceived that his prerogative as Captain General was thereby invaded, and having before observed the strong opposition of *Barneveldt* to all his views of ambition, he now resolved upon his destruction. He therefore disbanded the new levies, and joining with the Gomarists, prevailed in the end in procuring the execution of the Pensionary, and the destruction of his party. *Grotius*, as one of the most active of them, was condemned to be shut up for ever in such prison as the States should think fit, and with this prospect before him, he entered the fortress of *Louvestien* in the year 1619.—He was here, however, allowed the use of his library, and the company of his wife, a woman who seems to have been illustrious for various qualities, but for none more than those which peculiarly compose the province of female virtue. She was justly and eminently celebrated for resignation, fidelity, and conjugal tenderness, and at the same time for a very noble firmness and address. It was by the exertions of these qualities that she procured the escape of her husband. Through her means, he was carried out in a chest by his own guards, and she remained herself for some time voluntarily exposed to the resentment and indignation of his enemies.—He afterwards retired to France, where at Balagni, near Senlis, the house of the President *de Mesmes*, a man of high reputation in the law, he composed, in 1625, the most noble of his labours. (g)

The method which he pursued in order to produce a work, which, although coming from a private

man, should have the weight of a code of laws with Princes, he has himself expounded to us with great clearness in the preface. He found it necessary to get at some certain fixed principles which should be acknowledged to be such by all who read them. In order to do this, he was obliged to survey all the codes of morality and of general law which had ever been known: he penetrated into all the sciences between which and his own, he could discover any analogy; and he examined the opinions of all great men of whatsoever class, from which he could extract any thing like a community of sentiment. This, being properly arranged under its different heads, together with the vast additions of his own learning, and the support of all that could be drawn from history by way of precedent, he ventured, with very noble ambition to imagine might be received by the world as the rule for their duty in the most critical predicaments. The event answered all his expectations!

The work of *Grotius*, therefore, has for its support, all that the Philosophers, the Poets, the Orators, and the Critics of antiquity or of modern times can furnish. It is aided by all the lights which can be drawn from the famous civil and canon laws, cleared from its defects and the false glosses which had been put upon it by corrupt or ignorant interpreters; above all, it is finally corrected and stamped with authority, by the indications of the divine will, as collected from the inspired writers of the old and new Testaments, from the comments of the Hebrew divines, and the authority of the fathers. (*h*)

It is not surprising that a code thus supported, should have immediately advanced into celebrity, and put down in the end those various heterogeneous compositions which had till then formed the rule of

(*h*) Prolegoman, 40 to 56.

conduct for nations, and occasioned many of those discordant arguments and cases which we have related. The Elector Palatine, CHARLES LEWIS, was the first Prince who had the honour to be the real patron of the work; for although it came out dedicated to LEWIS XIII. yet it was strangely neglected by that King, who gave no reward to the author. The Elector, however, struck with its utility, ordered it to be taught publicly in his University of *Heidelberg*, and founded a Professor's chair, for the express purpose of teaching the *Law of NATURE* and of *NATIONS*. At the same time the envy of the Learned was almost equal to the merit of the writer. Parties were formed amongst them for the attack and the defence of the code, and those who defended it were stigmatized with the name of *Grotians*. All this was not uncommon; but what will be the ideas of those who are versed in this excellent Treatise, when they are told, on the authority of *Barbeyrac*, that such was the prejudice against it, that it was supposed to be calculated to annihilate the three great principles of the Roman law, "*HONESTE VIVERE; NEMINEM LADERE; SUUM CUIQUE TRIBUERE.*" (i) To such a height of error can prejudice and old habits carry us.

The sound strength of GROTIUS, however, soon overcame such puny opposition, and he had the satisfaction of observing the progressive reputation of his code. It became very early the favourite study of the great GUSTAVUS, who is said to have found as much pleasure from it, as ALEXANDER found from reading the poems of HOMER, and who proved his admiration of the author, by ordering him to be called to the public employments of Sweden. In 1656, it was taught in the university of *Wittenburg* as public law; and in about sixty years from the time of

(i) Barbeyr. Pref. to Grot.



publication, it was universally established in CHRISTENDOM as the true fountain-head of the EUROPEAN Law of Nations. (*k*)

We may suppose, however, that the minds of men being now called to new and important matters, did not let the subject pass off without adding their labours to its elucidation. Accordingly, innumerable commentaries were written upon it with various success, some of which have arisen to authority, although the most of them have died away, and are forgotten. Two great works, however, have been founded upon the Treatise, *De Jure Belli et Pacis*, which have deservedly attained to such celebrity and weight, that we cannot finish our subject without giving a place in it to their authors. The first is the famous work of PUFFENDORF; the second, of VATTIEL.

Although GROTIUS had taken a most extensive range, and endeavoured to search the duties of nations in war and peace to the bottom; yet the lovers of abstract reasoning, independent of particular application, found that there was something wanting to the perfection of his science. He had entitled his work, *The Laws of War and Peace*, in order, says Barbeyrac, (*l*) to engage the attention of Statesmen and Generals, whom it most concerned to understand them. He was forced, therefore, to plunge at once into his subject; and although, as he goes along, he satisfies his readers as to the reasons for their duty, yet it is by arguments taken up as it were *pro re nata*, the elements of which are supposed to be already understood; or if elementary principles are necessary for the elucidation of the point before him, a long discussion branches out from the immediate subject, which we feel would be better disposed of somewhere else: in the same manner as if, in proving a proposition of *Euclid*, we had not gone over the preliminary

(*k*) *Ib.*

(*l*) Barbeyr. Pref. to Grot.



propositions on which it was founded, but were obliged to stop in the middle of it, to prove the fundamental position.

It was to remedy this defect *in method*, that *Puffendorf*, many years after *Grotius*, took up the subject anew; and, beginning with the system of human nature, endeavoured to analyse the heart and mind of man as independent of society, before he came to enquire into his duties as a citizen. The whole, therefore, of what is called MORAL PHILOSOPHY, was set forth in detail by this great writer, as a proper supplement to what was wanting in *Grotius*, and as the true foundation of the public duties of nations.

These two works together, formed for a long time, and form still, the sources to which all Statesmen and Moralists must look for the resolution of difficulties, and the direction of virtue. They are, however, not totally without objection, although the objection is applicable more to their manner than their matter; more to the accidents of time and place, than to their intrinsic worth. In the first place, they seem to labour too much under the heaviness of form, which characterises most forensic treatises. Their speculations are, besides, loaded so much with quotations, that they are absolutely weighed down by them, and the progress of the reader to the end proposed, is inconceivably impeded. Not to mention that the work of *Puffendorf*, although it supplies the method which was wanting in *Grotius*, possesses not, perhaps, that brief perspicuity which in a long course of reasoning is so desirable. In addition to this, it has been supposed that the views which these two great men have taken of their subject, have not actually been so clear or so extensive as they might be. *Grotius* is imagined, in making the strong separation which he does between the Law of Nature and the Law of Nations, to have confined the latter too much to actual convention.

*Puffen-*

*Puffendorf*, in affirming that the Law of Nations is *exactly* the same as the Law of Nature obeyed by individuals, only applied to states, instead of men; is thought not to have entered deeply enough into the matter. For it is contended, that the particular application of this Law to Nations, is susceptible of various modifications, according to the different nature of the subjects on which it has to work, and which consequently renders the detail and minutiae of it different from the mere Law of Nature as obeyed by individuals. Hence, therefore, something was still supposed to be wanting to the perfection of the science. (m)

It was this which gave rise to the Treatise of Vattel, who, in his preface, has entered nicely into all these distinctions. Whether his objections to *Grotius* and *Puffendorf* were so weighty, as alone to render a new code necessary, it is perhaps needless to enquire. Certain it is, that the world is obliged to him for a very complete work, the model of which is more light and elegant than that of those heavy though magnificent structures which we have surveyed; for he has thoroughly cleared them from the cumbrous ornaments which were supposed to adorn them, and has rendered the way into the interior less difficult and obscure. His method is excellent: he marshals, in the outset, a series of preliminary principles, on which he professes to found all his future reasoning, and to which, in the course of it, he regularly refers. Whether his preliminaries, however, will always bear out his conclusions, it does not come within our intention to examine. At the same time one objection may, I think, fairly be made to him, which is, that he is too general, and often too slight, in his reasoning, and attends too little to its particular application; a mode for the most part un-

(m) Vattel Dr. des Gens. Pref.

satisfactory,

satisfactory, and frequently dangerous. It is perhaps a consequence of this, or to avoid the opposite fault of his two predecessors, that his work, though stored with excellent argument, is not sufficiently supported by the authorities of cases, without which even the reasoning upon natural law will want much useful elucidation, but which forms the very essence and base of all that concerns what he calls the *positive* Law of Nations. (n)

The Treatise of *Vattel*, therefore, does not appear by any means to preclude the necessity of studying the works of his masters. Whoever, indeed, would understand his subject thoroughly, and become acquainted with the Law of Nations in all its nicety and extent, let what will be his own stores of knowledge, or the depth of his thought, can hardly arrive at the end he proposes, without giving all his mind to the Treatises of those wonderful men.

And thus I have done with the account of this interesting Law, after having endeavoured, possibly with too great minuteness of attention, to trace its progress in Europe through all its various revolutions. We have seen it, comparatively regular, though cruel, under the *morality* of the Greeks and Romans. We have marked its annihilation under the followers of ODIN, and a barbarous religion: we have beheld it reviving under the influence of Christianity! At the same time I have attempted to point out the effects of all local circumstances upon that part of it which is *positive*; to trace the account of the uncertainty of the doctrines concerning it, till it is to be found resting at last upon sure ground, under the pilotage of the great Jurist of the last century. The vast body of materials which has been brought together, has spun out the work to a length far beyond my expectation; yet I have purposely past aside a variety

of interesting topics, and some very noble questions. I have done this, as well from the want of leisure from other occupations, as from the fear of fatiguing the reader; nor am I insensible how little qualified in many points I have been, for the execution of a work, whose subject at least must for ever be of consequence to mankind. Yet am I not totally without the hope, that those who are fond of investigating the nature of their species as it is to be found in their actions, or who, not content with what is, are willing to be told what was, and how it came to be, will not absolutely, throw away their time in perusing what is now with great diffidence committed to the world.

F I N I S.





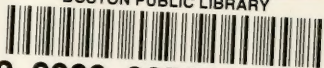








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